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Reform Commission

MANITOBA'S ENVIRONMENTAL ASSESSMENT AND LICENSING REGIME UNDER *THE ENVIRONMENT ACT*

Final Report

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Please note that the information provided and recommendations made in this Report do not necessarily represent the views of those who have so generously assisted the Commission in this project.

ACRYONYMS/ABREVIATIONS

CCME	Canadian Council of Ministers of the Environment
CEAA	Canadian Environmental Assessment Act
CEAA, 2012	Canadian Environmental Assessment Act, 2012
CEA	Cumulative Effects Assessment
CEA, 1968	Clean Environment Act, 1968 (Manitoba)
CEA, 1972	Clean Environment Act, 1972 (Manitoba)
CEC	Clean Environment Commission (Manitoba)
COSDI	Consultation on Sustainable Development Implementation
EAB	Environmental Approvals Branch (Manitoba)
EAP	Environment Act Proposal (Manitoba)
EAR	Environmental Assessment Report
EARA	Environmental Assessment and Review Agency (Manitoba)
EARPGO	Environmental Assessment and Review Process Guidelines Order (Federal)
EIS	Environmental Impact Statement
MLRC	Manitoba Law Reform Commission
MRTEE	Manitoba Round Table for Environment and Economy
NEPA	National Environmental Policy Act (USA)
NFAT	Need For and Alternatives To
NRTA	Natural Resources Transfer Agreement
RSEA	Regional Strategic Environmental Assessment
SDA	The Sustainable Development Act (Manitoba)
SEA	Strategic Environmental Assessment
TAC	Technical Advisory Committee

EXECUTIVE SUMMARY

Environmental assessment is the process by which the environmental implications of a proposed development are evaluated for consideration during approval and licensing decisions. Although commonly expressed as two separate terms, both assessment and licensing are considered to be part of the same continuous process in Manitoba as currently set out in *The Environment Act*.

Manitoba's environmental assessment regime evolved from statutory pollution control mechanisms that have been in place, in some form, since the late 19th century. With the enactment of *The Environment Act* in 1988, environmental assessment became a legislated requirement for certain types or classes of development. The Act has been amended several times since 1988, but its core provisions for environmental assessment and associated regulations have not changed. Reform is now appropriate to account for changing attitudes about the role of environmental assessment and ongoing technological advances.

In light of the Commission's statutory mandate to improve the law and administration of justice in Manitoba, the focus of this reform initiative is on changes to the legislation, regulations and policy framework for environmental assessment and licensing. The Recommendations set out in this Report are intended to result in a more contemporary, certain, transparent, and comprehensive framework for environmental assessment and licensing. The Report also aims to serve an educational purpose and fill some of the informational gaps that currently exist in available sources discussing Manitoba's legal framework.

Chapter 1 of this Report provides a brief introduction that discusses the Need for Reform and sets out the Commission's Reform Objectives. Chapter 2 of this Report provides background information on the development of Manitoba's current environmental assessment and licensing regime under *The Environment Act*. Chapter 3 sets out Manitoba's current environmental assessment and licensing process and briefly discusses the recent changes that have occurred to the federal environmental assessment process under the *Canadian Environmental Assessment Act, 2012*. Chapter 4 presents and discusses the Commission's recommendations for reform that aim to modernize and improve the transparency, certainty and scope of Manitoba's environmental assessment and licensing legislation. Chapter 5 is a summary of the Commission's recommendations for reform.

The Commission's recommendations focus on improving the public's access to information, creating more opportunities for public participation, and making the environmental assessment and licensing process more transparent. The recommendations also recognize a need to create more process certainty for all participants and to modernize the organization and language of the Act to ensure better compatibility with other jurisdictions in Canada. The Commission has also made recommendations that address problems identified with aspects of the current process such as appeals, post-licensing follow-up, and the need to expand the process to include a broader range of developments and environmental considerations.

SOMMAIRE

L'évaluation environnementale est le processus consistant à évaluer les conséquences environnementales d'un projet d'exploitation en vue de la prise de décision relative aux approbations et aux licences. Bien que l'évaluation, d'une part, et la délivrance de licences, d'autre part, soient communément exprimées en termes distincts, on considère qu'elles font toutes les deux partie du même processus continu au Manitoba, tel qu'il est énoncé dans la *Loi sur l'environnement*.

La cadre réglementaire du Manitoba relatif aux évaluations environnementales tire son origine de mécanismes légaux de lutte contre la pollution qui sont en place, sous une forme ou une autre, depuis la fin du 19^e siècle. Depuis la promulgation de la *Loi sur l'environnement* en 1988, l'évaluation environnementale est une exigence législative pour certains types ou certaines catégories d'exploitation. La Loi a été modifiée plusieurs fois depuis 1988, mais ses dispositions essentielles relatives à l'évaluation environnementale ainsi que les règlements connexes n'ont pas changé. Il convient maintenant de réformer les textes afin de tenir compte de l'évolution des attitudes à l'égard du rôle de l'évaluation environnementale ainsi que des progrès technologiques continuels.

Étant donné que la loi confère à la Commission le mandat d'améliorer les lois et l'administration de la justice au Manitoba, cette initiative de réforme met l'accent sur la modification des dispositions législatives et réglementaires ainsi que du cadre d'action relatifs aux évaluations environnementales à la délivrance de licences. Les recommandations formulées dans le présent rapport visent à rendre le cadre relatif aux évaluations environnementales et à la délivrance de licences plus à jour, plus certain, plus transparent et plus complet. Le rapport a également des objectifs éducatifs et vise à combler certaines lacunes en matière d'information que l'on constate actuellement dans les sources disponibles traitant du cadre légal au Manitoba.

Le chapitre 1 de ce rapport contient une brève introduction qui évoque la nécessité de la réforme et énonce les objectifs de la Commission de réforme du droit. Le chapitre 2 fournit du contexte sur l'élaboration du cadre réglementaire actuel au Manitoba relatif aux évaluations environnementales et à la délivrance de licences en vertu de la *Loi sur l'environnement*. Le chapitre 3 présente le processus actuel relatif aux évaluations environnementales et à la délivrance de licences au Manitoba et évoque brièvement les changements récents apportés au processus fédéral d'évaluation environnementale en vertu de la *Loi canadienne sur l'évaluation environnementale* de 2012. Le chapitre 4 présente et analyse les recommandations de réforme formulées par la Commission afin de moderniser les dispositions législatives ayant trait aux évaluations environnementales et à l'attribution de licences au Manitoba et d'en d'accroître la transparence, la certitude et la portée. Le chapitre 5 est un résumé des recommandations de la Commission en ce qui concerne la réforme.

Les recommandations de la Commission visent prioritairement à améliorer l'accès du public à l'information, en offrant à celui-ci davantage d'occasions de participer et en rendant plus transparent le processus relatif aux études environnementales et à la délivrance de licences. Les recommandations reconnaissent également la nécessité d'accroître la certitude du processus pour tous les participants et de moderniser l'organisation et le langage de la *Loi* en vue d'une meilleure harmonisation avec les autres provinces et territoires du Canada. La Commission a également formulé des recommandations à l'égard de problèmes liés à certains aspects du processus actuel, comme les appels et le suivi après l'attribution d'une licence, ainsi que sur la nécessité d'élargir le processus afin d'inclure un plus large éventail d'exploitations et de considérations environnementales.

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Appendix A: Glossary of Environmental Assessment Terminology

CHAPTER 1: INTRODUCTION

Environmental assessment is the process by which the environmental implications of a proposed development are factored into development approval decisions.[1] The process was first introduced in 1970 with the enactment of the U.S. *National Environmental Policy Act* ("NEPA"). Since then, over one hundred countries, and international aid and financial agencies have adopted formal environmental assessment procedures.[2] Engaging important economic, social, and environmental interests, environmental assessment has attracted the attention of policy-makers and law reformers for close to fifty years.

In Manitoba, environmental assessment evolved from statutory pollution control mechanisms that have been in place, in some form, since the late 19th century.[3] In 1975, Manitoba's Cabinet approved a policy for the establishment of an environmental assessment and review process for all proposed provincial developments that may significantly affect the environment as a result of air, water and soil contamination.[4] With the enactment of *The Environment Act* in 1988, environmental assessment became a legislated requirement for certain types or classes of development.[5]

A. The Need for Reform

In 1988, *The Environment Act* was ahead of its time in many ways. Its contemplation of social and economic effects, focus on environmental protection, and goal of maintaining resources for future generations was novel and progressive. The Act uniquely provides for an assessment and licensing process that includes both private and public developments, and its provisions for public participation remain a model for many Canadian jurisdictions.

The Act has been amended several times since 1988, but its core provisions for environmental assessment and associated regulations have not changed. Reform is now appropriate to account for changing attitudes about the role of environmental assessment and ongoing technological advances.

Recent amendments to federal environmental assessment legislation provide an additional impetus for these proposed reforms. The *Canadian Environmental Assessment Act, 2012* ("*CEAA, 2012*")[6] is fairly new legislation and it is not yet fully tested in practice and in the courts, but some experts predict fewer environmental assessments will be carried out with more limited scope under the new federal scheme.[7] Changes to the federal process include the elimination of certain process options and new triggering, screening and scoping factors, and revised procedures. This underscores the need for a more comprehensive and effective environmental assessment and licensing regime in Manitoba.

This is not the first reform initiative to consider Manitoba's environmental assessment process. There was a significant amount of investigation and consultation undertaken over the past decade that has explored different possibilities for improving the provincial process. For example, the

Report on the Consultation of Sustainable Development Implementation ("COSDI")[8], and the Department of Conservation and Water Stewardship's publication: *Building a Sustainable Future*[9], are public documents that explored possibilities for reforming *The Environment Act*.[10] Many of the recommendations presented in this Report build upon the ideas expressed in these earlier initiatives.

B. Objectives for Reform

In light of the Commission's statutory mandate to improve the law and administration of justice in Manitoba, the focus of this reform initiative is on changes to the legislation, regulations and policy framework for environmental assessment and licensing in this province. While expressed as two separate terms, both assessment and licensing are considered to be part of the same continuous process and are inseparable.

Several past studies have evaluated environmental assessment processes for their effectiveness and efficiency, considerations which inform this reform initiative as well. [11] In this context, effectiveness refers to "whether something works as intended and meets the purpose for which it is designed."[12] A well-designed environmental assessment system should also be efficient in terms of costs in time, money and human resources.[13]

Consistent with the Commission's mandate, and bearing in mind the reasons for reform, this Report is focused on providing recommendations for reform that are intended to result in a more contemporary, certain, transparent, and comprehensive framework for environmental assessment and licensing. The Report also aims to serve an educational purpose and fill some of the informational gaps that exist in available sources discussing Manitoba's legal framework. These reform objectives inform the analysis in the following ways:

Contemporary: The recommendations recognize the need for an updated legislative framework that addresses the environmental priorities of Manitobans and is compatible with the current legislative frameworks in operation in other Canadian jurisdictions. These reforms also encourage the development and use of a variety of legislative, regulatory, and policy instruments in relation to the environmental assessment and licensing process.[14]

Transparent: The recommendations recognize the need for clear indicators and criteria about how and why important decisions are made under *The Environment Act*. For the purpose of this initiative, transparency includes both identifying criteria for making decisions and ensuring as much information as possible is provided to the public by various means including the public registry.

Certain: The recommendations recognize the need for more certainty and clarity of Manitoba's environmental assessment and licensing process. Achieving an appropriate balance between certainty and flexibility is a critical challenge in the design of an environmental assessment and licensing regime.

Comprehensive: The recommendations recognize the need for an environmental assessment and licensing process that considers the complete life-cycle of a development and the associated effects at each stage. The need to increase the range of development projects and licensing decisions that could trigger the requirement for an environmental assessment under *The Environment Act* is also addressed. The recommendations recognize the need to collect a full range of information (scientific, local and Aboriginal Traditional Knowledge) associated with a proposed project, including the opinion of the public and Aboriginal communities, to be considered by decision-makers at all stages of the environmental assessment and licensing process.

The scope of environmental assessment and licensing in Manitoba is far-reaching, and the Commission has been selective in its choice of suggested reforms. This Report identifies several issues that will require further research and review by the provincial government before reforming *The Environment Act*. However, the focus of the majority of the recommendations is on those issues for which there is a sufficient body of knowledge and experience to identify good or, in some cases, best practice. This Report is also reflective of the need for reform and attempts to provide, at the very least, some discussion of concepts that were identified by a majority of participants but still remain contentious.

Chapter 2 of this Report provides background information on the development of Manitoba's current environmental assessment and licensing regime under *The Environment Act*. Chapter 3 sets out Manitoba's current environmental assessment and licensing process and briefly discusses the recent changes that have occurred to the federal environmental assessment process under *CEAA, 2012* and their implications. Chapter 4 sets out the Commission's recommendations for reform that aim to modernize and improve the transparency, certainty and scope of Manitoba's environmental assessment and licensing legislation. Chapter 5 is a summary of the Commission's recommendations.

C. Public Engagement

The Commission has been fortunate to receive a wide range of input from individuals and organizations representing the varying interests of those who participate in Manitoba's environmental assessment and licensing process. Such input was gathered in response to the Commission's *Discussion Paper on Manitoba's Environmental Assessment and Licensing Regime* published in January 2014, presentations made to students and practitioners, in-person meetings held with interested groups and individuals, and the Commission's *Consultation Report on Manitoba's Environmental Assessment and Licensing Regime* published in January 2015.

While all of the feedback received by the Commission has been important for the identification of the issues most significant to Manitobans, there was little agreement among the participants as to the position that should be taken by the Commission. This lack of consensus is indicative of the competing interests and perspectives involved in environmental assessment and licensing and highlights the diversity and complexity associated with any decision that could potentially affect the environment.

Although there was little agreement on specific issues, there were common themes evident in the feedback received from the participants. For example, there was substantial concern about the changes to the federal environmental assessment and licensing system under *CEAA, 2012*. In particular, participants identified a need to undertake an in-depth review of Manitoba's environmental assessment and licensing system to make sure that any gaps or deficiencies resulting from *CEAA, 2012* were filled by the process under *The Environment Act*.

Another common theme was a need for stronger connections between environmental assessment and licensing legislation with other legislative and political processes – such as consultation under section 35 of the Canadian Constitution, land use planning, sustainable development, and government policy development. Participants also commonly identified a need for more process certainty, better opportunities for meaningful public participation, more transparent decisions at all stages of the process, and legislated timelines for the various stages of the process under the Act.

Many participants highlighted the importance of the past work undertaken by COSDI, the Manitoba Round Table for Environment and Economy ("MRTEE"), and the Canadian Council of Ministers of the Environment ("CCME"). The issues identified in the publications arising from these initiatives remain valid today and will be highlighted in this Report where appropriate.

The Commission has attempted to address the concerns voiced by those who took the time to submit written feedback and meet with Commission staff. However, it was not possible to incorporate the complete range of issues identified. Instead, this Report has focused on providing recommendations for legislative changes to *The Environment Act* alone. While some outside issues may be discussed for educational purposes, the recommendations of this Report are focused on possible changes to *The Environment Act*, and its corresponding regulations and guidance documents.

The variety of suggestions for reform that the Commission has received over the course of this project highlights the competing range of interests that need to be considered when reforming Manitoba's environmental and natural resource legislation. Therefore, the Commission recognizes that there is a need for the provincial government to create more extensive opportunities for the public, proponents, legal practitioners and Aboriginal communities to participate meaningfully in reforming *The Environment Act*.

CHAPTER 2: HISTORY

A. Introduction

The Province of Manitoba, due to its geological history and geographic location, supports a large variety of natural resources that are both renewable and non-renewable. The eastern and northern areas of the province fall within the Canadian Shield which makes these areas rich in minerals, forests and freshwater resources.[15] The southern region of the province is dominated by agricultural practices that take advantage of the rich soil characteristic of a prairie flood plain.[16] There is also an increasing development of the crude oil deposits that exist in the southwest area of the province.

Manitoba's economy has historically been dependent on industries that have developed around the extraction and use of its natural resources in areas such as agriculture, mining, forestry, fishing and hydroelectricity.

There has been very little written on Manitoba's environmental legal history so this Chapter provides a brief overview of the legal developments that have led to Manitoba's current environmental assessment and licensing regime.[17] Other legal elements that are related to and may have a future bearing on this regime are also discussed.

Aboriginal Communities in Manitoba

When discussing Manitoba's history and natural resource development it is important to recognize the role that Aboriginal populations have played. As acknowledged by the Royal Commission on Aboriginal Peoples, "Non-Aboriginal accounts of early contact tend to emphasize the 'discovery' and 'development' of North America by explorers from Europe. But this is a one-sided view. For at least 200 years, the newcomers would not have been able to survive the rigors of the climate, succeed in their businesses (fishing, whaling, fur trading), or dodge each other's bullets without Aboriginal help."[18]

The Commission understands that historically there has been a wide range of terminology used to describe Canada's first inhabitants and that it is important to recognize that such terminology represents more than just a choice of words.[19] Since this Report is written from a legal perspective, the Commission has chosen to use the term "Aboriginal" to refer to First Nations, Inuit and Métis peoples as defined in Section 35 of the Canadian Constitution.[20]

There are limited sources that provide discussion of Manitoba's history, and for the most part, they have been written from a European perspective. Therefore, discussions surrounding the early history of Manitoba, such as the signing of treaties and the issuance of scrip, are often described in a way that does not reflect the perspective of Manitoba's Aboriginal communities.[21] The Commission acknowledges this informational disparity and suggests that the Government of

Manitoba work in partnership with Manitoba's Aboriginal communities to ensure that more historic accounts of the province's origin and early development are produced that are better representative of all relevant perspectives.[22]

While the meaning of the treaties signed in Manitoba, starting in 1871, and the result of the Dominion government's practice of issuing scrip to Manitoba's Métis population is not agreed upon, it is undisputable that these practices resulted in an influx of European settlers to Manitoba beginning in the 1870s. These settlers utilized the provincial landscape largely for agricultural settlement and the natural resources these lands possessed, such as the forests and minerals, "fuelled the newly developing economy of the Canadian West."[23]

It would not be possible within the scope of this Report to properly address the impact that the inflow of European settlers and the resulting resource dependent economy has had on the health, wealth, and culture of Manitoba's Aboriginal communities. Therefore, the following historic description of the use and regulation of Manitoba's natural resources has been limited to a very brief account of the statutory and other legal changes that have played a role in the development of the current environmental assessment and licensing legal framework in Manitoba. The Commission acknowledges the important role that Aboriginal people have played in Manitoba's history and is in no way disregarding their part in Manitoba's development and the effects that were felt in their communities as a result.[24]

Natural Resource and Environmental Law

This Chapter involves discussions of both environmental and natural resource law. While these two areas of law are related and sometimes addressed in the same legislation, both branches have a different focus. **Environmental law** is focused primarily on protecting environmental resources.[25] This can include the regulation of potentially harmful conduct, legal frameworks designed to produce information needed to make sound environmental decisions (e.g. environmental assessment processes) and the imposition of liability for environmental damage (e.g. contaminated sites legislation). **Natural resource law** is generally designed to regulate the use of environmental resources.[26] Natural resource legislation normally focuses on granting permission for the exploitation, management and conservation of water, mineral, forest and other environmental resources. Such legislation usually also addresses the rental and usage fees associated with the granting of rights to use natural resources.

Both areas of law must be discussed in this Chapter to gain a complete understanding of the development of the legal frameworks that protect and regulate the environment today in Manitoba. Although later Chapters of this Report focus predominantly on Manitoba's current environmental laws, it is important to keep in mind that in almost all situations involving the protection, exploitation and management of natural resources, there is an interaction between environmental and natural resource laws that should be examined for a proper understanding of the issues.

B. Jurisdiction over Manitoba's Natural Resources 1870-1930

In any jurisdiction, legal control of natural resources is important for many reasons such as the ability to raise revenue, manage economic and political development[27], and strengthen the political position of the authority with control.[28] This economic and political benefit is in large part why the government of Manitoba struggled for the first sixty years of its existence to gain control of the province's natural resources.[29] The fight for control of Manitoba's natural resources played an important role in the province's early history. The resulting economic and environmental implications of this anomalous legal situation are also important and they have shaped the development of our current environmental legislation.

Manitoba became a province on July 15, 1870 when *The Manitoba Act* took effect.[30] The United Kingdom had already transferred Rupert's Land and the North-Western Territory to the Dominion government in 1869 with the *Rupert's Land Act*, but this transfer did not become official until the Hudson's Bay Company received a payment of £300,000 in 1870.[31] This new fifth province of Canada was a small piece of land, roughly 35, 000 km^2, around the Red River Valley and Portage La Prairie.[32]

The establishment of the province of Manitoba created a constitutional anomaly regarding the control over provincial natural resources.[33] As opposed to the legal powers granted to the already existing provinces of Ontario, Quebec, Nova Scotia and New Brunswick, when Manitoba was created the Dominion retained control over the province's natural resources.[34] Section 30 of *The Manitoba Act* provided "that all ungranted or waste lands in the Province shall be, from and after the date of the said transfer, vested in the Crown, and administered by the government of Canada for the purposes of the Dominion".[35]

The rationale behind maintaining such control is debated, but is usually linked to the Dominion's intention to expand the railway system and provide land for new immigrants as part of the Homestead Policy.[36] Others have suggested that this restriction on the new provincial government was in part a form of punishment for the Resistance of 1869-1870 led by Louis Riel.[37] The Resistance is generally viewed as an attempt to protect the rights of the Métis in the transfer of land from the Hudson Bay Company and the Dominion. However, Louis Riel also addressed the issue of natural resource ownership and was one of the first political leaders to outline a set of arguments regarding provincial control of natural resources.[38] Although Riel was defeated, these arguments were later adopted by Manitoba's provincial leaders.[39] Whatever the intention behind the Dominion maintaining control of Manitoba's natural resources, this decision created a sore point for provincial political leaders that would be the basis of political strife for the next sixty years as provincial leaders made attempts to regain what they believed should be under Manitoba's control.[40]

Despite an expansion of provincial borders in 1881,[41] and another in 1912,[42] Manitoba's government did not assume control of its natural resources until 1930.[43] Until this time, the Dominion controlled Manitoba's base mines and minerals, and water rights.[44] However, this did not include the right to certain roads, trails and highways.[45] It is also possible that precious minerals were not included in the Dominion's control.[46] For a time the provincial government had control of Manitoba's swamp lands.[47]

Statements made by Prime Minister Borden (1912) and later by Prime Minister Mackenzie King (1922), acknowledged the disadvantaged position that Manitoba had been placed into with the passage of *The Manitoba Act* and the desire of the Dominion government to return control of the natural resources.[48] However, it took until 1928 for the *Royal Commission on the Transfer of the Natural Resources of Manitoba* to be appointed to finalize the specifics of the transfer.[49]

In 1929, an agreement was signed between the Dominion of Canada and the provincial government of Manitoba to transfer the interest of all Crown lands, mines, minerals and royalties associated with them to the province. This *Natural Resource Transfer Agreement* ("NRTA")[50] essentially involved the transfer of natural resources to the province along with compensation from the Dominion government for the lost revenue that was a consequence of the lack of provincial control of lands and resources for sixty years.[51] On July 15, 1930, the NRTA came into effect and finally placed the provincial government in control of Manitoba's natural resources.[52]

The NRTA triggered a phase of provincial government expansion since the responsibility of overseeing the use of natural resources in the province required the creation of new government departments and significant expansion of existing departments.[53] This political expansion also involved the development of legislation to regulate and protect the natural resource rights that were now vested in the provincial Crown.

C. Condition of Manitoba's Natural Resources: 1930

The early years of Manitoba's existence were dependent on the exploitation of the province's natural resources by new settlers and as a source of revenue for the growing forestry, mining, fishing and agricultural industries. Since the Dominion retained control of Manitoba's natural resources until 1930, there was little provincial legislation in existence that dealt with the regulation or protection of natural resources until this time.[54] During this period of Dominion control, a significant amount of environmental damage occurred as a result of immigration policies, industrial development and a general lack of enforcement of the federal legislation that existed at the time. It has even been suggested that, due to this poor regulation and protection on the part of the Dominion government, it may have actually been a better financial decision for Manitoba's leadership to leave control of provincial resources to the Dominion for a while longer.[55] "These resources had been so poorly regulated and protected in the years prior to 1930 that their value was seriously reduced".[56]

While there was some early recognition of the importance of conservation and pollution prevention, Manitoba's natural resources were predominantly valued in economic terms by government, and this approach was reflected in early legislation and policy decisions.[57] The following sections provide a very brief discussion of some of the main industries that relied on the use of Manitoba's natural resources and their historical impact on the environment. This information is presented only to provide some insight into the condition of the environment at the time the provincial government took control and to highlight the importance and consequences of later environmental legislation by discussing a time in history when there was little to no legal protection for Manitoba's environment at either the federal or provincial level.

Mining

The mapping of northern Manitoba began in the late 18th century, but it was not until the early 19th century that a more detailed account of Manitoba's mineral resources was compiled.[58] Once the economic potential of the mining industry was recognized, prospecting became continuous and mining companies were quickly established.[59] Between 1870 and 1914, around 10,000 acres (4,047 ha) of quarry sites and quartz mining locations were granted for industrial mining purposes. When the Dominion made changes to the federal mining regulations in 1914, an additional 45,000 acres (18,211 ha) of provincial land was granted for mining.[60]

The early mining industry was responsible for a large amount of environmental destruction in northern Manitoba. In particular, early mining developments resulted in significant water pollution, loss of fish stocks and other wildlife populations, and damage to surrounding forest ecosystems.[61] The revenue created by mining was seen by government as being of much higher importance than the prevention of such environmental degradation as is evident from provincial legislation passed in 1928 that "designated a 1,036,000 ha district in northern Manitoba where industrial pollution was permitted and where "the mine companies would be exempt from 'all damages arising from smelting operations.'"[62]

When the provincial government gained control of Manitoba's natural resources in 1930, an estimated 500,000-600,000 acres (202,343-242,812 ha) worth of mineral leases were still pending.[63] The NRTA stipulated that existing contracts had to be honoured, so there was no possibility that the provincial government could receive new revenue from the land until these leases had expired.[64] This reality, combined with the legal exemptions enjoyed by the mining industry, played a significant role in the economic hardships faced by the province after gaining jurisdiction over its natural resources.

Forestry:

Forestry played an important role in Manitoba's early development. New immigrants used available timber resources to build homes and furniture, and timber was essential for the development of early railways and the construction of agricultural structures including grain elevators.[65] The forestry industry in Manitoba was regulated by *The Dominion Forestry Act*. Under this Act, settlers could obtain a permit to cut logs from Crown lands for building purposes. They could also get permits for cutting trees on vacant Crown lands. Most permit holders took their logs to a sawmill to be turned into lumber. By 1900, there were thirty-three sawmills operating in the province.[66]

Timber dues were introduced in 1889 and became a good source of revenue for the Dominion government.[67] Since these dues were calculated based on the amount of timber cut, many lumbermen would often underestimate and under-report the amount they cut to reduce the fees they owed. This underreporting of timber harvesting and the fact that timber regulations were rarely enforced has made it difficult to determine the amount of timber that was taken out of the province before 1930.[68] Based on the numbers found in old government records, the Dominion government "granted settlers, lumbermen, and railway contractors the right to take out 1,500,000,000 board feet of saw lumber, 12,000,000 linear feet of building logs, 4,000,000 railway ties, 1,333,000 cords of pulp and firewood, and millions upon millions of shingles, lathes, roof poles, fence posts, telegraph poles and telephone poles."[69] By the time the provincial government took control, most of Manitoba's old growth forests were harvested.[70]

The Dominion government's system of granting timber berths through public auction led to a few companies securing control of the majority of Manitoba's timber. For example, by 1930, Manitoba Paper had secured "a virtual monopoly on all the pulpwood within central and eastern Manitoba".[71] The ability of such companies to secure wood from settlers without having to pay the dues they normally would have if harvesting from their Crown-granted berths, resulted in several decades where the government (Dominion and then later Provincial) received very little revenue for the large amount of wood harvested from provincial forests.[72]

Fisheries:

Freshwater fish played an important role in the early Red River Settlement. In the 1880s, when the expansion of the rail system allowed for export to the United States, the local fishing industry began to expand into the commercial market.[73] By 1888, over 2,000,000 lbs (907,185 kg) of fish was being exported to southern markets every year.[74] While the largest fisheries were located in Lake Winnipeg and Lake Manitoba, the commercial fishing industry spread along the Saskatchewan and Nelson rivers in the early 1900s.[75] Despite an early recognition that the fisheries in Manitoba were in serious danger of over-exploitation, efforts to protect important fish stocks were "an utter failure".[76] By the time the provincial government gained control of its natural resources in 1930, fish stocks were severely depleted. Between 1870 and 1930 there were at least 500,000,000 lbs (226,796,200 kg) of fish taken out of Manitoba's waters.[77]

When Manitoba's natural resources were transferred in 1930, "sturgeon were almost non-existent, whitefish, the backbone of the inland fishery, were not only depleted in number but were of a much smaller average size than in the early days of the fishery; and the tullibee (or lake cisco) population was so badly infested with worms as to make that fish totally unacceptable for the export market."[78] By this time the Manitoba fishing industry was also heavily dominated by American fish companies. This monopolization affected the economic benefits that local fishermen and the provincial government should have been able to enjoy from such a lucrative industry.[79]

Hydroelectric Development:
The force of running water was harnessed for use by human populations even before Manitoba became a province. By the time the province was established in 1870, many of the creeks surrounding the Red River Settlement had already been dammed so that water mills could be utilized.[80] The province's capacity to produce hydro-electricity was recognized early on and by 1900 the first hydroelectric generation station went into operation.[81] In 1906, the Pinawa hydroelectric generating station became the first in Manitoba to operate all year round.[82] The Point Du Bois generating station followed in 1911[83] and Great Falls became the fourth Manitoban generating station in 1923.[84]

In 1913, the Dominion government's Department of Mines had conducted a geological survey in northern Manitoba to determine the hydroelectric generation potential of the area's rivers.[85] Despite identifying problems with transmitting energy over long distances at the time, the report's determination of generation potential led to further studies which ushered in an era of northern hydroelectric development. While the majority of this development began in the 1940s and 1950s, some of the environmental effects of such projects - like changes in water levels, blockage of fish migrations and the destruction of fish habitats – were recognized before this time.[86] By 1930, the province's fifth generating station was already under construction.[87]

Agriculture:
Agriculture has played a significant economic role in the development of Canada and was particularly important to the formation of Manitoba.[88] The possibilities for commercial agricultural production helped attract new settlers and sustained the growing communities of the Red River Valley before the province of Manitoba was even formed.[89] Shortly after 1870, railway connections between Winnipeg, St. Paul, Minnesota and Eastern Canada were completed. This allowed Manitobans increased access to larger markets in which to sell agricultural goods.[90] As a result of this new economic opportunity, the demand for agricultural land significantly increased. By 1891, the most favourable areas of Manitoba were already settled.[91]

The lucrative nature of agriculture played a major role in the transformation of Manitoba's environment. Early settlers were granted permits to cut down as much timber as needed to build dwellings and furniture and to create space to grow crops.[92] The need for more agricultural land also contributed to large amounts of marsh land being converted to arable land that could be utilized for the production of crops.[93] The provincial government was even granted jurisdiction over parcels of marsh land from the Dominion government to meet this need. In 1880, *The Drainage Act* was enacted to create a legal structure for the drainage of these marsh lands.[94]

While very little legislation in Manitoba has dealt with the regulation of agricultural practices, the province's earliest pollution control legislation, discussed below, was focused on preventing agricultural by-products such as manure from being dumped in the province's freshwater sources.[95]

By the time the provincial government took control of the province's natural resources in 1930, the landscape of Manitoba was very different than it was at the Province's creation in 1870. Along with a significant expansion of provincial borders, almost all of the hardwood forests in the province had been depleted, the mining industry had significantly altered the northern landscape and the freshwater fisheries had undergone serious degradation. Due to the state of Manitoba's natural resources and the costs associated with establishing new provincial environmental management and protection programs for reforestation, fire protection and disease control, the provincial government would see few direct benefits from having control of Manitoba's natural resources until the 1940s.[96]

D. The Expansion of Provincial Regulation: 1930

Once provincial control over Manitoba's natural resources was obtained in 1930, there was a flood of new legislation enacted to better manage Manitoba's resources. In anticipation of the *Natural Resources Transfer Agreement*, the provincial government had already enacted ***The Mines and Natural Resources Act***[97] in 1928, since this government department would be responsible for the administration and enforcement of the legislation. Although there had been significant damage done to Manitoba's environment during the years when the Dominion maintained control, this new provincial legislation was largely focused on controlling resource rights and setting fees for the use of such materials. This enabled the provincial government to enjoy the economic benefits of Manitoba's natural resource based industries.

The Forest Act provided authority for the administration of Manitoba's forest resources.[98] This Act established a limit on the size of timber berths[99], but did not limit the number of berths that could be awarded to the same person.[100] To obtain a berth, an individual had to operate a mill of a specified size and for a specified time of the year. A licence granted for cutting under this Act was for a one year term but could be renewed for up to fifteen years.[101] *The Forest Act* forbade the export of pulpwood and only allowed companies or individuals owning a pulp mill to secure a pulpwood berth.[102] The emphasis on pulpwood in the legislation was an indication that the government was aware that the timber resources of the Province had been reduced to small trees.[103]

The provincial government also carried on the preservation work that had been started by the Dominion and maintained the five forest reserves that had existed previous to provincial control.[104] Under *The Forest Act*, all lands described in the schedule of the Act to be Manitoba Forest Reserves were withdrawn from disposition, sale, settlement or occupancy and could not be sold, leased or disposed of unless the Act allowed.[105] Riding Mountain was not included as a Manitoba Forest Reserve since it was made into Manitoba's first National Park in 1930 under the *National Parks Act*.[106]

Control of provincial water resources was also transferred to Manitoba in 1930, at which time the province enacted ***The Water Rights Act***[107] and ***The Water Power Act***[108], giving the province the authority to license the diversion of water and other water uses.[109] *The Water Rights Act* addressed domestic, industrial, municipal, irrigation and other water usages.[110] This Act also established requirements for the construction of licenced activities,[111] expropriation[112] and enforcement of the Act.[113]

The Water Power Act established jurisdiction over water power and the Crown lands needed for its creation, development or protection.[114] Licences granted under this Act addressed the diversion, use or storage of water for power purposes. Activities that could affect water within a water power reserve were also addressed.[115]

Although ***The Mines Act*** and ***The Mining Companies Act*** were enacted before the provincial government was granted jurisdiction over the minerals contained in the province,[116] a new version of *The Mines Act* was enacted in 1930 to reflect the jurisdictional changes resulting from the NRTA.[117] Under the *Mines Act, 1930* a new Mines Branch was established within the Department of Mines and Natural Resources.[118]

The legal history surrounding the regulation and usage of natural resources in Manitoba provides important insight into the economic, political and environmental conditions that existed during the formative years of our province. These historical experiences have shaped the scope and subject matter of the natural resource legislation that was enacted in 1930 and continues to form an important part of Manitoba's environmental legal framework.

The remainder of this Chapter focuses on the development of the environmental protection regimes that eventually led to Manitoba's current framework for environmental management, assessment and licensing. It is important to keep in mind that, in most cases, the natural resource legislation introduced above continues to regulate the use of Manitoba's natural resources today. It also plays a role in the planning, construction and operation of developments that fall under *The Environment Act* and its environmental assessment and licensing process. Proponents of many such developments are required to obtain permits, licences or other approvals issued under these Acts as a condition of their Environment Act Licence.

E. Protection of the Environment – Early Pollution Control Legislation

While the discussion of Manitoba's environmental history so far has focused on the exploitation of the province's natural resources, there was some early legal recognition of the effects that the province's forestry, mining, agricultural and fishing industries had on the environment. Despite the fact that the province did not have legal control over provincial resources until 1930, the provincial government established pollution control legislation very early. For the most part, this legislation was focused on controlling the pollution of Manitoba's freshwater sources that resulted as a consequence of the growing forestry and agricultural industries. This type of pollution control legislation also began to deal with the regulation of municipal sewage in the 1930s.

Manitoba's first pollution control legislation was *The Sanitary Act*, which was enacted in 1871.[119] This was also Manitoba's first water quality control legislation and it was the only anti-pollution legislation in force in Manitoba until 1905.[120] The primary purpose of the Act was to prohibit the deposit of "any stable or barn manure, or any night soil, or any other filthy or impure matter of any kind, along the bank of any river or running stream."[121] The Act also prevented "filthy and impure matter" from being dumped into the rivers and streams.[122]

In 1905, Manitoba's second pollution control legislation was enacted.[123] *An Act for Protecting the Public Interest in Rivers, Streams and Creeks* allowed any individual to float timber, rafts or other craft down rivers, creeks and streams, but forbade the placing of obstructions in or across those channels.[124] It also forbade the owners or occupiers of sawmills from depositing sawdust, waste wood and other milling wastes in those watercourses. The legislation served to regulate the disposal of some of the more visible forms of water pollution and addressed the growing awareness of the pollution caused by the forestry industry.

There was an amalgamation of these two pieces of pollution control legislation in 1913 with the enactment of *The Rivers and Streams Act*.[125] This new Act was divided into three parts: the first addressed the "Pollution of Rivers and Streams"[126], the second addressed the "Public Interest in Rivers and Streams" [127], and the third addressed "Navigation of Rivers or other Waters".[128] The first two parts of the Act were very similar to the previous statutes that had been combined. The third part however, provided new provisions for the protection of property near navigable waters in the province.[129]

In 1935, Manitoba's pollution protection framework expanded to include restrictions on substances such as decaying matter, lime, chemical substances, drugs, poisonous matter and garbage. This broadened scope was a result of *The Pollution of Water Prevention Act*.[130] This pollution control legislation was passed partly because of a perceived need to reduce the pollution in Manitoba's river systems, particularly in the Red River.[131] This new Act included the pollution sections previously contained in *The Rivers and Streams Act*, which was revised concurrently in 1935.[132] *The Pollution of Water Prevention Act* not only broadened the scope of materials prohibited from banks, but it also allowed for the creation of a Provincial Sanitary Control Commission.[133] This Commission consisted of at least three persons appointed by the Lieutenant Governor-in-Council and its duties under the Act included "general supervision and control over all matters concerning pollution of or the discharge or draining of sewage and waste into any body of water"[134]. The Commission had the power to conduct investigations concerning polluting activities and sewage discharges, and to order the abatement, control or halting of such actions. It was also authorized to issue licences permitting certain prescribed levels of drainage or discharge of wastes into water bodies.[135] The Commission could authorize the formation of sewage districts if a municipality or group of municipalities wished to regulate the disposal of their waste materials.[136] This Act remained in effect until 1968 when it was repealed and replaced by *The Clean Environment Act*. *The Pollution of Water Prevention Act* has been credited with reducing overall water pollution levels in Manitoba and getting some of the province's major water pollution issues under control.[137]

F. *The Clean Environment Act*: 1968-1988

The Clean Environment Act is an important piece of legislation in Manitoba's legal history, not only because it is the predecessor of *The Environment Act*, but because it was the first Act in the province to reflect the need to provide more comprehensive protection for the environment: air, water and land. This growing concern about the effects of pollution beyond water sources was reflected at all levels of government in Canada in the 1960s and 1970s as new federal and provincial departments were created and new environmental legislation was developed.[138] When *The Clean Environment Act* was introduced in 1968, it reflected this new recognition "that any action taken should be taken in the context of the whole environment… water, air and soil" [139] and was viewed as providing a means of containing pollution and controlling the environment "for generations to come."[140]

The Clean Environment Act[141] ("*CEA, 1968*") acted as a replacement for *The Pollution of Water Prevention Act*. Like this previous legislation, *CEA, 1968* focussed on the regulation and control of pollution. However, as mentioned above, this new legislation was more general than its predecessor in the sense that it was not restricted solely to water pollution and "allowed recognition of the holistic nature of the physical environment."[142] The legislative scheme for pollution control was now focused on prohibiting and preventing the pollution of air, water and soil. The intent was to prohibit the contamination of the physical environment without a "valid and subsisting licence".[143] As stated by the Honourable Minister Witney in 1968, the purpose of the CEA, 1968 was:

> to prevent the destruction or spoilage of the natural environment by excessive, harmful or dangerous contamination; and secondly, to ensure that in years to come the environment will not be despoiled beyond recovery; and third, to make every possible allowance for the reasonable usage of the air, soil, and water resources of the province for the purpose of final and innocuous disposal of treated and conditioned effluence in such a way that industry will not be discouraged from entering the province.[144]

The *CEA, 1968* also established the Clean Environment Commission ("CEC") and made the CEC responsible for the environment.[145] The creation of the CEC allowed the provincial pollution prevention scheme to mirror the previous method used under *The Prevention of the Pollution of Waters Act* and "require all the major polluting agencies with respect to air, soil, and water to secure a licence from the CEC and to meet with such conditions as the commission may deem appropriate to protect the environment."[146] This essentially meant that the CEC replaced the Sanitary Control Commission as the administrative body overseeing licensing and the setting of minimum pollution standards but with an expanded scope since the pollution of air and soil was now included under the Act.[147]

Under the *CEA, 1968*, the CEC had general supervisory powers and control over all matters related to the preservation of the natural environment and the prevention and control of any environmental contaminants.[148] Additionally, it could investigate any matter respecting the contamination of the environment, and could summon witnesses and take evidence in the course of any investigations.[149] The CEC could also order any person contaminating the air, land or water to control or cease the activities causing such contamination.[150]

The terms and conditions of licences issued under *CEA, 1968* were determined by the CEC. These licenses authorized the "discharge, deposit, or emission of contaminates or waste into or onto the air, soil or water."[151] Licences could be granted on an interim basis,[152] could have an expiry date,[153] and were not transferable.[154] These "licences to pollute" were viewed very negatively by the public which contributed to the legislative amendments made in 1972.

A hearing could be held by the CEC to consider an application for a licence, the suspension or cancellation of a licence, or the making of a prohibition order.[155] An appeal could be made to the Municipal Board by anyone affected by a decision or order made by the CEC.[156] The decision of the Municipal Board in an appeal situation was final.[157]

A controversial aspect of the *CEA, 1968* was the saving provisions throughout the legislation that allowed exemptions for the contamination of the air, soil and land.[158] As Minister Green argued, "for each section which places a restriction on pollution we have an equal and equivalent and indeed longer savings provisions and I think, [...] that possibly this Act is going to be confused with... *The Exemptions Act*, not at least by its title but by what it says throughout."[159] The *CEA, 1968* also granted the Lieutenant Governor-in-Council the ability to exempt any person who was previously permitted to emit contaminants or waste.[160] "[T]his appears to be an omnibus one which in effect [...] says that anything that is now done may continue to be done if the people who are doing it gain the approval of the Lieutenant Governor-in-Council"[161].

The *CEA, 1968* was amended in 1970[162] and 1971[163]. The amendments of 1970 were quite significant and focused on providing more clarification of the saving provisions and the licensing and hearing provisions. Sections 2 to 4 of the amendment act expanded on the existing saving provisions and clarified more specific activities that were exempted.[164] Section 7 of the amendment act repealed sections 13 to16 of *CEA, 1968* and replaced these sections with more specific sections covering the licensing and hearing provisions of the Act.[165] Under these new sections, the CEC was now able to hold hearings during the term of a licence to determine if the licencee was in compliance.[166] The ability of the CEC to refuse a licence was also clarified.[167] Instead of holding a hearing for every licensing decision, the CEC could now issue an "ordinary licence" without a hearing. However, any person who had "an interest or [was] likely to be affected" by such an ordinary licence could submit an objection to the CEC which could result in a hearing.[168] The amendment made in 1971 was very minor and resulted in a slight modification of the savings provisions.[169]

In 1972, the legislative scheme under *The Clean Environment Act* underwent significant amendment.[170] The new version of the Act ("*CEA, 1972*") revised provisions of the existing legislative scheme so that licences were no longer required by dischargers. Instead of issuing 'licences to pollute', the release of contaminants in excess of prescribed limits was now prohibited.[171] The *CEA, 1972* also significantly changed the general powers of the CEC. These changes can be linked to a licensing decision made by the CEC in 1971. In May, 1971, the CEC considered an application from a hog farm in the Rural Municipality of Springfield under *CEA, 1968*. After a two-day hearing, the CEC granted the hog farm an interim licence and made an order which required the applicant to reduce the size of the farming operation and to phase out the active system of waste disposal in large part due to complaints received by adjacent residents. Since the hog farm was operating in an area zoned for agricultural purposes and was not violating any provincial laws, the provincial government took an active interest in the CEC's decision and the order requiring alterations to the farm's operation. In 1972, *The Clean Environment Act* was amended which reduced the powers of the CEC and allowed for an amendment of the 1971 CEC order issued to the hog farmer.[172]

CEA, 1972 revised and reduced the investigatory powers of the CEC.[173] It also removed responsibility for the environment from the Commission and gave it to the Minster.[174] The Minister was also given the power to establish and appoint members of an advisory committee to assist him with carrying out the purposes and provisions of *CEA, 1972*.[175]

As mentioned above, licences were no longer issued by the CEC under the *CEA, 1972*. The word "licence" was removed from the definitions section of the Act, and the CEC was now restricted to setting limits, where the existing regulations did not cover the situation, on the amounts of contaminants which could be released into the environment.[176] The CEC could still make prohibition orders to control or cease contamination if any person was not complying with the set limits.[177] All orders made by the CEC under the previous Act could now be appealed to the Minister who could then alter or cancel the order.[178] All orders made by the CEC after the enactment of the new legislation could also be appealed to the Minister who could then refer the matter to The Municipal Board.[179] The Lieutenant Governor-in-Council was also able, under *CEA, 1972*, to delegate the powers of the CEC to the City of Winnipeg.[180]

One of the most controversial sections of CEA, 1972 was s. 13(2) which allowed the Lieutenant Governor-in-Council to "restrict or limit the number of industries, undertakings, plans or processes that may be permitted to be operated in the province [...] for such period of time as he [deemed] advisable."[181]

The *CEA, 1972* underwent a series of amendments between 1974 and 1984,[182] and it was replaced by *The Environment Act* in 1987. Amendments of note include:

- the addition of abatement projects to the legislative scheme[183];
- a required submission of a proposal prior to constructing, altering or setting into operation any development that could result in environmental contamination[184];
- new parameters for expropriating land under CEA, 1972[185];
- requiring the appeal decisions made by the Minister to have approval from the Lieutenant Governor-in-Council[186];
- the ability to appeal decisions of Environment Officers to the Court of Queen's Bench[187];
- the ability of the Court of Queen's Bench to grant an injunction to cease operation[188];
- new parameters for environmental accidents[189];
- the ability of the Minister to take action when there was a "danger to human health"[190].

By 1986, the regulations under *CEA, 1972* covered a range of issues including: Livestock Production Operations; Incinerators, Liquid Effluent Discharges from Pulp and Paper Mills; Disposal of Whey; Waste Disposal Grounds; Lead Smelters; Campgrounds; Gasoline and Associated Products; Amy Street Heating Plant; Hazardous Materials; Private Sewage Disposal Systems; Litter; and Pesticides.[191]

The frequent revisions to the Act, to meet with changing societal and political perceptions of environmental protection, played a part in the replacement of the *CEA, 1972*.[192] It is clear that the development of this legal framework, particularly the sections addressing the powers of the

Minister and the CEC, influenced the development of *The Environment Act*. Provisions similar to those in the *CEA, 1972* are still in force today.[193]

G. Environmental Assessment

After World War II, there was increasing concern around the world about the impact of human activities on the environment. Governments began developing political and legal strategies that were aimed at improving environmental protection mechanisms, such as the development of stronger environmental legislation like *The Clean Environment Act*. Although these legislative schemes aimed at reducing and preventing pollution played an important role in improving environmental conditions, some governments went a step further and recognized the need to assess the potential environmental effects that new and existing developments had on their surrounding ecosystems. In 1970, the United States of America became the first country to introduce legislation that included the concept of environmental assessment with the enactment of the *National Environmental Policy Act* (NEPA).[194] As the ramifications of this new legislation were being determined by the American courts, the issue of environmental assessment began to attract even more interest around the world with the United Nations Conference on the Human Environment that was held in Stockholm, Sweden in 1972.[195]

In Canada, there was a rising public awareness of environmental damage and increasing visibility of environmental assessment mechanisms being utilized by the United States and addressed at the international level. This created a public expectation that Canada should introduce its own domestic environmental assessment practices.[196] Although NEPA provided a powerful example of such practice, the federal government chose to follow a different model than established by the United States.

In 1973, environmental assessment was introduced in Canada as Cabinet policy at the federal level.[197] Following this federal initiative, Manitoba developed its own environmental assessment policy which was approved by the provincial Cabinet in 1975. Due to a combination of changing public perceptions of environmental protection, scientific developments at the international and federal level, and a growing realization that Manitoba's environment was being increasingly affected as a result of economic developments, Manitoba formalized an environmental assessment and licensing process as part of *The Environment Act*, enacted in 1988.

Cabinet Policy: 1975-1988

An environmental assessment and review process was introduced in Manitoba by the Cabinet on November 12, 1975.[198] This policy introduced environmental assessment as a decision-making mechanism. Environmental assessment was described as "a process to inform a decision-making authority of the potential effects of a proposed action on the environment" that "embodies an evaluation of the environmental conditions which may be affected by a proposed undertaking."[199] This policy was specifically linked to the *Clean Environment Act*.[200]

This environmental assessment policy ensured that environmental assessments were carried out for all proposed provincial development projects that could significantly alter or affect the environment due to contamination of air, water and soil. The results of environmental assessments were made subject to review by the Cabinet who could then permit, modify or disallow the proposed action. These results were to be incorporated into the planning, implementation and operational phases of the project if approved.[201]

As part of the implementation section of the policy, an Environmental Assessment and Review Agency ("EARA") was established within the Department of Mines, Resources and Environmental Management. Decisions of the EARA were made subject to the approval of the Minister of Mines, Resources and Environmental Management. The decision to permit, modify or disallow a proposed action resided with Cabinet.[202] A seven-step environmental assessment process was established as part of this policy.[203]

When an environmental assessment was submitted to the Minister, a review of the submission was prepared by the EARA and a notice was required to be given (in such a manner determined by the Minister) to the proponent, the clerk of each affected municipality and other persons identified by the Minister. Public participation was "considered essential to the environmental assessment" and it was suggested that the proponent introduce citizen involvement early in the assessment. Public hearings could be initiated by the Minister or the CEC.[204]

Appendices 1-4 of the Policy included:

- Project Description Guidelines[205]
- Environmental Impact Assessment Guidelines:
    - Guidelines Respecting all Environmental Effects of a Proposed Project[206];
    - Guidelines Respecting Probable Adverse Effects Which Cannot be Avoided[207];
    - Guidelines Respecting Alternatives[208]; and
    - Guidelines Respecting the Relationship between Local Short-term Uses of the Environment and Maintenance and Enhancement of Long-term Productivity.[209]
- Information on the screening of projects and a list of sample projects[210]

Examples of projects that required submission to the Manitoba EARA included: nuclear power developments, hydro or thermal electric power development, hydro transmission facilities, highways of four lanes or more, highways and roads constructed on a territory or in a region where no highway or road existed previously, highways including bridges necessitating physical encroachment upon a lake or water course, pipeline construction, dam or barrier construction, rail lines, channelization improvements to major water courses, provincial forest reserves and parks.[211]

The Environment Act: 1988

On March 31, 1988, *The Environment Act* replaced *CEA, 1972* and the environmental assessment process set out in the 1975 Cabinet Policy. The intent of *The Environment Act* was (and still is) to "develop and maintain an environmental management system in Manitoba which will ensure that the environment is maintained in such a manner as to sustain high quality of life, including social and economic development, recreation and leisure for this and future generations."[212] The Department of Environment and Workplace Safety and Health was the authority responsible for administrating the environmental assessment and licensing process when this legislation was enacted in 1988.[213]

Under *The Environment Act*, the scope of environmental protection was expanded with a new definition of environment that included "air, land, and water, or plant and animal life, including humans".[214] This Act built off the processes established by the *CEA, 1972* and the Cabinet policy of 1975 and formally connected environmental assessments to a new licensing process under the Act.[215] *The Environment Act* still forms the basis of Manitoba's environmental assessment and licensing process today. Unlike legislation in Canada and other provinces, Manitoba's environmental assessment and licensing process includes both private and public developments. The legislative scheme allows potential developments to be reviewed depending on the nature and location of the development.[216]

The Environment Act formalized the role of the public in the environmental assessment and licensing process. The Clean Environment Commission continued to function under this new legislation, but with slightly different powers. The purpose of the CEC under the Act is to provide advice and recommendations to the Minister and to develop and maintain public participation in environmental matters.[217] An interesting inclusion in *The Environment Act* is a requirement placed on the Minister to provide an opportunity for public participation and seek advice and recommendations for the development of new regulations or for amendments to the Act.[218]

Section 4 of the Act required the Minister to prepare a "State of the Environment Report" within three years from the date of the coming into force of the legislation (so by 1991) and "at least every two years thereafter". The report was required to contain a "description of Manitoba's environmental quality, and activities related to present environmental issues" and "future environmental issues, projected trends and environmental management activities".[219] This section was repealed in 1997 by *The Sustainable Development and Consequential Amendments Act*.[220]

Although *The Environment Act* established an environmental assessment and licensing process, the purpose of the Act is also to provide a legislative framework for a number of aspects of environmental management. For example, the Act requires that site-specific limits and standards for actual or potential pollution be addressed by the province through the legislative scheme.[221] The regulations under the Act also cover a range of environmental issues and in many cases mirror the content of the regulations under *CEA, 1972*.[222] *The Environment Act* is still in force today and has not been significantly amended since its enactment.[223] Manitoba's current environmental assessment and licensing process will be discussed in Chapter 3.

H. Sustainable Development: 1990s - Present

The first widely accepted definition of sustainable development came from the 1987 United Nations Report of the World Commission on Environment and Development: *Our Common Future* (the "Brundtland Report"). [224] This report described sustainable development as a path of economic, environmental, social and political progress "that meets the needs of the present without compromising the ability of future generations to meet their own needs"[225]. For development to be sustainable it must fully incorporate three basic "pillars": environment, society and economy. This means that important decisions should involve a consideration of the environmental, social and economic effects of a proposed development. Since the 1980s, governments, non-governmental organizations and many private corporations have embraced this idea of sustainable development.[226]

Although this Report is focused on Manitoba's environmental assessment and licensing process, it is important to discuss the implications that the concept of 'sustainable development' has had for Manitoba's environmental legal regime. Starting in the 1990s, the potential application of sustainable development in Manitoba was a focus of government initiatives. In particular, the connection between sustainable development and environmental assessment and licensing was given significant consideration at this time. Although the treatment of sustainable development has remained separate from environmental assessment and licensing in Manitoba's legislative framework, there continues to be a discussion about the incorporation of these two approaches today.[227]

Throughout the 1990s, the Manitoba Round Table for Environment and Economy (MRTEE), worked on creating a sustainable development policy and supported the formalization of sustainable development principles into Manitoba's legislation. The MRTEE was a multi-stakeholder round table created by the provincial government on October 5, 1988.[228] MRTEE's key task was to "identify policy directions that would help to transform government and society, ensuring sustainable development as an outcome."[229] In 1994, MRTEE released *A Discussion Paper for a Sustainable Development Act*, which proposed the adoption of sustainability assessments[230] and the incorporation of sustainability principles into all aspects of land use planning, licensing and related decision-making processes.

In 1996, the provincial government released the *White Paper on the Sustainable Development Act* which followed the recommendations of MRTEE and proposed large scale legislative changes to environmental licensing in Manitoba.[231] However, the final version of *The*

Sustainable Development Act, enacted in 1998, did not include these contentious reforms to the environmental assessment and licensing regime.[232]

In 1997, the government initiated a multi-stakeholder consultation process, known as the Consultation on Sustainable Development Implementation (COSDI) to develop suggestions on how to implement the principles and guidelines set out under *The Sustainable Development Act* in land use and environmental decision-making and to address the components of the *White Paper* that were not included in the Act.[233] The final report, released in 1999, supported the suggestions of MRTEE and the *White Paper,* and recommended broad changes to Manitoba's environmental assessment and licensing regime to move the process towards sustainability assessment.

With the publication of Manitoba's *Sustainable Development Strategy* in 2000, the government signified its acceptance of the COSDI report and began the process of implementing its recommendations.[234] In 2001, Manitoba Conservation released a White Paper proposing changes to *The Environment Act*, including an expansion of the environmental assessment process "to include all the components of sustainable development".[235] This Paper also identified unresolved issues in relation to potential changes, which were addressed in a 2002 report to the government.[236] This report was produced by members of a "Core Group" that were involved in all aspects of public consultation for the proposed reforms to *The Environment Act*. Many of the members had been involved in COSDI as well. This report also supported the expansion of Manitoba's environmental assessment and licensing process.[237]

The government of Manitoba has been committed to sustainable development since the enactment of *The Sustainable Development Act* in 1998.[238] While formal linkages between sustainable development and environmental licensing have been discussed since the early 1990s, this idea is not yet formalized in the provincial environmental assessment and licensing regime. However, the provincial government has continued to keep sustainable development part of Manitoba's political dialogue.[239]

There have also been recent discussions of reforming *The Sustainable Development Act*. The provincial government released *Consultation on Proposed Green Prosperity Act* in early 2013 and held a public consultation seminar in February 2013 to discuss creating a new Act – *The Green Prosperity Act* – to renew Manitoba's sustainable development framework.[240] The status of this reform initiative is unclear, but if changes are made to Manitoba's sustainable development framework, it is very possible that the province's environmental assessment and licensing scheme may be affected and would therefore require amendments to *The Environment Act*.

CHAPTER 3- *THE ENVIRONMENT ACT*: ENVIRONMENTAL ASSESSMENT AND LICENSING

A. Introduction

As discussed in the previous Chapter, the concept of environmental assessment was introduced into Canada in the early 1970s and it has now been incorporated into the statutory law of almost all Canadian jurisdictions. Although the first environmental assessment processes in Canada were largely discretionary and based on government policy initiatives, there was a shift in the late 1980s to early 1990s towards an environmental assessment system that was codified in law. This led to the creation of Canada's current legislative processes.[241] In Manitoba, the environmental assessment and licensing process is set out under *The Environment Act*. While this Act was considered progressive at the time of its introduction in 1988, after several decades during which only minor amendments have been made, a thorough review is now appropriate.

The legal frameworks for environmental assessment at the federal level, and in most provincial/territorial jurisdictions, have undergone significant changes over the last 30 years. These changes have been considered throughout this project to ensure that Manitoba's environmental assessment and licensing scheme reflects contemporary environmental assessment practices. While a discussion of possible reform options for *The Environment Act* occurs later in the Report, this Chapter focuses on Manitoba's current environmental assessment and licensing process. The recently amended federal process under *CEAA, 2012* is also examined.

B. The Current Process in Manitoba

The environmental assessment and licensing process under *The Environment Act* is currently administered by the Environmental Approvals Branch (EAB) of the Department of Conservation and Water Stewardship.[242] Both the Municipal and Industrial Section and the Land Use and Energy Section of this Branch play a role in administering the process. Compliance monitoring and enforcement of the Act is the responsibility of the Environmental Compliance and Enforcement Branch of the Environmental Stewardship Division of Manitoba Conservation and Water Stewardship.[243]

In Manitoba, all developments with the potential for significant environmental effects require a site specific assessment and approval from the Director of Environmental Approvals or the Minister of Conservation and Water Stewardship prior to construction, operation or alteration. In order to obtain such an approval, called an Environmental Act Licence, the proponent must submit documentation that provides decision-makers with information about the proposed development which can include an Environment Act Proposal, a scoping document and an environmental assessment report.[244] Such documents are reviewed by various members of government and provided to the public for comment. Public hearings are held by the Clean

Environment Commission at the request of the Minister of Conservation and Water Stewardship for a small percentage of developments that require an environmental assessment under the Act.

Under *The Environment Act*, environmental assessment and licensing follows a series of seven separate, though often overlapping procedural steps:

1. Proponent submits an Environment Act Proposal
2. Environment Act Proposal is reviewed
3. Proponent is requested to provide further information
4. Opportunity for public hearing
5. Licensing decision is made
6. Appeals and judicial review
7. Post-licensing follow-up

This section briefly describes these seven steps in the context of Manitoba's legislative and policy framework. As will be discussed in more detail later in this Report, some of these steps are discretionary and may be by-passed if the Director or Minister decides that it is appropriate based on information provided and public concerns expressed. While there is only one mandatory opportunity for the public to participate under the Act, there are several other points in the process at which the Director or Minister can require that the public be given the opportunity to provide their input.

Is the Project a Development?

Before a proponent begins the first step of the environmental assessment process, which involves completing and submitting their Environment Act Proposal, they must first determine whether their proposed project requires an environmental assessment. Under *The Environment Act*, the *Classes of Development Regulations* prescribe lists of developments that automatically trigger the environmental assessment process.[245] Any proposed development that is consistent with those identified in the *Classes of Development Regulation* is subject to an environmental assessment under the Act. This can include existing and already operating developments.[246] If there is a disagreement as to whether a proposed project is a "development", the Minister has the authority to make the final determination.[247] The Minister does not currently have the power to require an environmental assessment for projects that are not listed in the Regulations.[248]

Proponents are advised to contact the EAB if they are unsure whether a proposed project is a development or not. If a proposed project is not a development, proponents are advised to contact the regional department office in the project area to review any other environmental requirements.[249]

1) Proponent submits an Environment Act Proposal

The environmental assessment and licensing process is initiated when a proponent files a proposal containing a description of a proposed project with the EAB, provides required documentation and submits the appropriate application fee.[250] The requirements for this description, called an Environment Act Proposal ("EAP"), are outlined in the Environment Act Proposal Form[251], the *Licensing Procedures Regulation*[252] and in Manitoba Conservation and Water Stewardship's *Information Bulletin – Environment Act Proposal Report Guidelines*.[253] It is common for proponents to hire private sector consultants to prepare the EAP for their proposed development.[254]

As outlined in the *Licensing Procedures Regulation*[255], the potential environmental effects that must be described in the EAP includes, but is not limited to:

- The type, quantity and concentration of pollutants to be released in the air, water or on the land;
- Effects on wildlife;
- Effects on fisheries;
- Effects on surface and groundwater;
- Forestry-related effects;
- Effects on heritage resources; and
- Socio-economic implications resulting from the environmental effects.

The EAP must also describe the proposed environmental management practices and mitigation measures, and provide a schedule indicating the dates of construction and commencement of operation. If the construction of the project is being proposed in stages, this information must also be included in the EAP.

Typically a proponent will meet with representatives of the EAB prior to submission of a development proposal to explain the proposed project and to obtain information and guidance on the submission of the proposal. Once submitted, EAPs are advertised to the public, put in the public registry in both electronic and hard copy form, and assigned an EAB contact person.[256] According to the Act, a copy of the EAP must also be filed with the Interdepartmental Planning Board and other departments that may be affected by the proposed development.[257]

2) Environment Act Proposal is reviewed

The technical review and assessment of EAPs is the responsibility of the Municipal and Industrial Section and the Land Use and Energy Section of the EAB.[258] The Technical Advisory Committee also assists with this review.[259] During this step of the process, the EAP is checked for completeness and the level of assessment is determined.

Based on the wording of the Act, the assessment path appears to be essentially the same for all Classes of Development, except for a difference in the decision-maker (Director or Minister) depending on the class of development. However, in practice, developments are subject to different requirements based on their particular characteristics (i.e., type and size), the potential for significant adverse environmental effects, and public opinion. These differences in the assessment process depend on the discretionary power of the decision-maker to determine what kind of further information may be required from the proponent and whether a public hearing will be held by the CEC.

3) Proponent is requested to provide further information

After the proponent has submitted an EAP, there are no further mandatory information requirements under the Act. However, further information is usually requested by the Department for most developments. There are two methods that are used by the Department to obtain such information:

- Providing the proponent with a formal request for information[260]; or
- Requiring further studies and information about environmental protection and management plans or a formal environmental assessment and assessment report.[261]

However, for the large majority of Manitoba developments (particularly Class 1), the final licensing decision is made on the basis of an EAP that also provides information about the outcome of the development's environmental assessment. In these cases, the scope of the environmental assessment is generally determined by the proponent before the EAP is filed, with reference to the informational requirements in the *Licensing Procedures Regulation*.

For complex or controversial Class 2 or 3 developments, the Director or Minister may require a separate detailed environmental assessment report, often described as an Environmental Impact Statement ("EIS").[262] The Act also authorizes the Minister or Director to issue guidelines and instructions for this EIS. This can be considered part of the "scoping" process which involves identifying the major issues and effects associated with a proposed development and determining procedural and informational requirements of the assessment and final report. In practice, proponents sometimes draft their own guidelines which may be made available for public comment and are subject to review and modification by the EAB.[263]

Since most developments in Manitoba are reviewed on the basis of their hybrid EAP/EIS (as discussed above), there are very few developments in Manitoba that have formal, publicly reviewed "scoping" documents. Typically, scoping documents are only issued for Class 2 or 3 developments that are likely to be referred to the Clean Environment Commission for a public hearing.[264]

Formal Environmental Assessment and Reporting

Environmental or "impact" assessment is the process of identifying and analyzing the potential effects of a proposed development, and proposing appropriate mitigation techniques and follow-up actions. While this stage of the process, the point when data collection, effects prediction and evaluation of potential environmental effects occurs, is often identified as occurring after an initial proposal has been submitted to government and reviewed by the department and the public, in Manitoba, this part of the process often begins before the EAP is submitted.

The proponent is responsible for assessing the potential effects of a proposed development, and in Manitoba, the analysis of such assessment is found in either the EAP or a separate environmental assessment report, if required by the appropriate decision-maker. While there are government issued guidelines for the preparation of an EAP and similar instructions contained in the *Licensing Procedures Regulation*, there are no mandatory requirements and corresponding guidance for producing an environmental assessment report.[265] There are also no technical requirements or guidance materials on how EIS are to be conducted, prepared, or reviewed.

4) Opportunity for public hearing

Public hearings are not mandatory under the Act, but instead rely on the discretion of the Director and/or Minister.[266] Public hearings are generally required for Class 2 and 3 proposals that have elicited significant concern from the public, or create a significant risk of wide-reaching adverse environmental effects. Public hearings are held for approximately 1% of proposed developments in Manitoba.

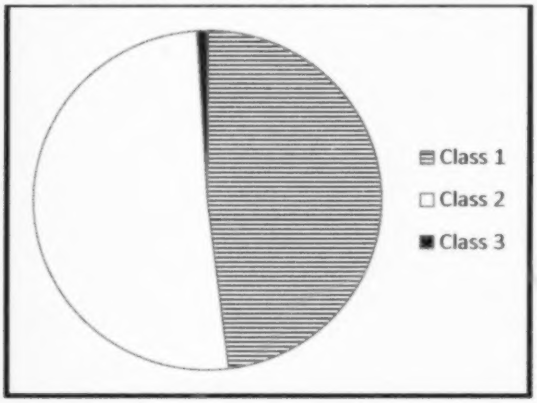
Under the Act, the CEC is the body in charge of conducting public hearings when requested to do so by the Minister. When such a request is received, the role of the CEC is to "notify the public [...], open the participant assistance process, conduct the actually hearings, and [...], provide recommendations to the Minister based on the evidence received during the hearing."[267] These recommendations are considered by the Minister when making the final licensing decision, and if such recommendations are not included in the Environment Act Licence issued later by the province, the Minister is required to provide publicly available written reasons.[268]

5) Licensing decision is made

In Manitoba, the Director or Minister reviews the content of the EAP and/or the environmental assessment report before making a licensing decision, with input from the TAC, IPB, EAB and the public. The Minister can order a public hearing to review the environmental assessment of any class of development but this is typically the case only for Class 2 or 3 developments. In such cases, the CEC conducts public hearings and makes licensing recommendations to the Minister which are then considered, along with the EAP/environmental assessment report before the final licensing decision is made.

This is the stage at which the decision-making authority either approves or rejects a project proposal. If the project is approved, licensing terms and conditions are imposed on approved developments and issued in a formal licensing document. In Manitoba, the Director has decision-making authority over Class 1 and 2 developments and the Minister makes decisions for Class 3 developments. However, *The Environment Act* allows the Minister to exercise the Director's authority over Class 1 and Class 2 developments where a public hearing has taken or will take place. Of all licences granted in Manitoba, approximately 48% are for Class 1 developments and 51% are for Class 2 developments. Class 3 developments represent less than 1% of the licences issued.[269]

Breakdown of Licenses Issued 2004-2014



6) Appeals and Judicial Review

All development approval or rejection decisions under the Act are subject to judicial review. Judicial review is concerned with the procedural legality of the administrative process, and does not typically address a decision's merits. Some environmental assessment decisions are also subject to statutory appeal. In Manitoba, any person who is affected by the Director's licensing decision under sections 10 and 11 of the Act, may appeal to the Minister. The Lieutenant Governor-in-Council considers appeals for the Minister's decisions made under sections 10, 11, 12 or 14(2) of the Act.

7) Post-Licensing Follow-Up

This is the stage at which developments are supervised to ensure compliance with the terms and conditions imposed by the Environment Act Licence. In Manitoba, proponents are generally expected to monitor and manage the development's effects themselves. Many licences issued under the Act require the proponent to submit an Environmental Management Plan that identifies how mitigation measures, follow-up actions and license terms and conditions are to be implemented, monitored and reported on.

There are also statutory enforcement mechanisms under the Act that are also relevant to post-licensing follow-up.[270] The Environmental Compliance and Enforcement Branch of Conservation and Water Stewardship is responsible for overseeing most of these statutory requirements and enforcement mechanisms. This Branch uses a range of compliance responses that range from a letter of warning to possible charges under section 30 of the Act. It is rare for a licensee to be charged under the Act for failure to comply with licence conditions – instead, warnings and licence suspensions are more common.

C. The Federal Assessment Process – *CEAA, 2012*

After World War II, the environment effects of developing Canada's natural resources, including the destruction of wildlife habitat, air and water pollution, and the contamination of fish, started to be acknowledged. As public interest in environmental issues grew during the late 1960s and 1970s, and NEPA was introduced in the United States of America, the Canadian government recognized the need to develop new ways to protect the environment, particularly in relation to the construction and operation of projects that could adversely affect the surrounding ecosystems.[271] In 1973, with the adoption of a new policy, the federal Cabinet made its first formal commitment to review the environmental effects of federal decisions.[272] In 1984, the government of Canada adopted the *Environmental Assessment and Review Process Guidelines Order* (EARPGO) which codified the environmental assessment process created under the previous Cabinet policy. EARPGO was declared legally binding on all government departments, agencies and regulatory bodies by the Federal Court of Canada in 1989.[273]

In 1995, the federal government enacted Canada's first federal environmental assessment legislation: the *Canadian Environmental Assessment Act* ("*CEAA*").[274] By the early 2000s a legislated review of *CEAA* was initiated by the Minister of Environment and a series of amendments were made to the environmental assessment and licensing framework.[275] On April 26, 2012, the federal government introduced Bill C-38, the *Jobs, Growth and Long-Term Prosperity Act*, a provision of which repealed *CEAA* and replaced it with a new *Canadian Environmental Assessment Act, 2012* ("*CEAA, 2012*").[276] Bill C-38 received Royal Assent on June 29, 2012 and *CEAA, 2012* came into force on July 6, 2012.[277]

CEAA, 2012

The *Canadian Environmental Assessment Act, 2012* was introduced as an "updated, modern approach that responds to Canada's current economic and environmental context."[278] The enactment of *CEAA, 2012* was presented as a way of implementing the central elements of *Responsible Resource Development*, the federal government's action plan aimed at modernizing the regulatory system to allow for natural resources to be developed in a responsible and timely way for the benefit of all Canadians.[279] However, the changes that have resulted from the enactment of this new legislation have been heavily criticised and are considered to have weakened the ability of the federal environmental assessment process to contribute to the protection of Canada's environment.[280]

While review of the federal environmental assessment process under *CEAA, 2012* is not within the scope of this Report, it is important to provide a brief discussion of the major changes to the process and some of the most common criticisms since these federal changes in large part inspired the Commission's review of *The Environment Act*. There were also many comments received from those who provided the Commission with input that reflected these same concerns and a need to update Manitoba's environmental assessment process to ensure our provincial process addresses any gaps or deficiencies created by the new streamlined federal legislation and to maintain a high level of environmental protection in the province.

An overview of the current federal environmental assessment process will not be provided in this Report. However, elements of the legislation and process will be discussed in the next Chapter and a list of useful sources describing the process under *CEAA, 2012* is provided.[281] Although the following discussion focuses on some of the perceived problems with the new federal process, it must be noted that there are positive elements of the current process that will be used in the next Chapter as examples of good practice.[282]

Changes to the Process under *CEAA, 2012*

One of the most significant changes to the federal environmental assessment process that has occurred as a result of *CEAA, 2012* is a reduction in the number of projects to be assessed going forward.[283] Under *CEAA, 2012*, the number of projects that could trigger an assessment has been reduced, the types or categories of potential projects are fewer, and the size thresholds for projects requiring environmental assessments are greater. By limiting the scope of federal assessments many matters of shared environmental jurisdiction have now been left to provincial/territorial assessment processes, which may cover only some of the projects involved. Even for matters of exclusive federal concern, *CEAA, 2012* provides for substitution of 'appropriate' provincial processes.[284]

There were also changes made to the available review options under the federal process. The former *CEAA* involved three levels of review, as opposed to the two levels available under the new *CEAA, 2012*.[285] This has also contributed to fewer projects being required to undergo a federal environmental assessment. Projects that trigger an environmental assessment under *CEAA, 2012* can also be excused from a federal environmental assessment at the discretion of the Canadian Environmental Assessment Agency ("CEA Agency") or the Minister.[286]

CEAA, 2012 has also resulted in fewer available options for members of the public to participate in the review of proposed projects. Under *CEAA*, almost any member of the public could provide their opinion of a project to a review panel in person. *CEAA, 2012* has restricted such public participation to "interested parties" during hearings which include "persons directly affected by the designated project, as well as those with relevant information or expertise."[287]

Another aspect of *CEAA, 2012* that has been criticised is an increase in the discretion allocated to the Minister throughout the environmental assessment process.[288] This discretionary aspect of *CEAA, 2012* has been viewed as potentially leading to the politicization of the environmental assessment process.[289] High levels of discretion are also linked to uncertainty and unpredictability which can have serious financial implications for proponents and usually affect the public's ability to properly understand how the process works.

Overall, the changes under *CEAA, 2012* have been seen by some parties as a means of weakening federal environmental assessment law as a result of the significant reduction of projects that will trigger a federal assessment, new constraints on public participation, and the potential increase in uncertainty that could occur as a result of more discretionary power for the Minister. *CEAA, 2012* appears to have shifted the federal government to an environmental assessment and approval process that involves substantial delegation to the provinces/territories and a narrowing of the federal environmental assessment framework. It seems that it is now up to provincial/territorial environmental assessment processes to ensure that there is comprehensive consideration of the environmental, social and economic implications of proposed new developments.[290]

Manitoba-Federal Co-operation Agreement

One aspect of the new federal environmental assessment process that remains unclear is whether the federal government will re-sign the co-operation agreements that previously existed under *CEAA*. In order to create a more streamlined process under *CEAA* for developments that trigger both a provincial/territorial and a federal environmental assessment, the federal government signed agreements on environmental assessment cooperation with eight provinces and territories. These agreements are a result of CCME's *Canada-wide Accord on Environmental Harmonization*[291] and the *Sub-Agreement on Environmental Assessment*.[292] All of these federal-provincial/territorial cooperation agreements predate *CEAA, 2012* and have expired. It is not clear whether these agreements will be renewed.[293]

The *Canada-Manitoba Agreement for Environmental Assessment Cooperation* was last renewed in 2007.[294] Under this agreement, Canada and Manitoba agreed to the following objectives:

1. foster cooperation between Canada and Manitoba concerning the environmental assessment of project proposals;
2. achieve greater efficiency and the most effective use of public and private resources, where environmental assessment processes involving both parties are required by law; and
3. establish accountability and predictability by delineating the roles and responsibilities of the federal and provincial governments.

In Manitoba, the concept of a cooperative environmental assessment was never fully realized, even with the existence of the agreement. In all cases where the cooperation agreement has been followed, two environmental assessment reports have been produced: one federal and one provincial, both with different timelines and sometimes different outcomes.[295]

CHAPTER 4- REFORMING *THE ENVIRONMENT ACT*

Environmental assessment plays an important role in decision-making processes where there is the potential for irreversible or significant harm to the environment. The basic idea of this concept is that proposed human activities should be scrutinized based on the possible environmental consequences of the action before such harm occurs.[296] In Canada, the Supreme Court has recognized environmental assessment as "an integral component of sound decision-making"[297], especially since "the growth of modern societies has shown the serious problems that can result from anarchic development and use of land, in particular those problems concerning public health and the environment."[298]

Environmental assessment has been formally included in Canadian law since the Ontario government established Canada's first legislated assessment process in 1975.[299] Since then, all other jurisdictions in Canada have followed Ontario's example and created their own processes for assessing the potential environmental effects of new and existing human activities. Despite the fact that environmental assessment has been widely accepted across Canada, there are significant differences among the scope, procedures, and legal enforceability of Canadian environmental assessment regimes.

While many of the various environmental assessment tools used across Canada will be discussed, the focus of this Report is on Manitoba's legislated process for environmental assessment which is formally connected to the issuance of licences under *The Environment Act*. Since environmental assessment and licensing regimes like Manitoba's are developed to address the specific and unique characteristics of the environmental, societal and economic components of its corresponding jurisdiction, it is important to remember that some of the legislative examples that will be discussed have very different legal and social origins than Manitoba's regime.

The previous Chapters of this Report have provided some background information on the development of Manitoba's current environmental assessment and licensing regime and have acknowledged some of the issues identified by Manitoba's public, such as the enactment of *CEAA, 2012*, which have inspired this review of *The Environment Act*. Although it has not been possible to incorporate all of the feedback received over the past few years, the Commission has attempted to address as many of the public's concerns as possible.

This Chapter will build on the information provided earlier in this Report and will discuss the perceived deficiencies with the environmental assessment and licensing regime under *The Environment Act* and will provide recommendations for reform. These deficiencies were identified based on a review of academic literature, feedback received from the Committee, participants and other parties that have provided input to the Commission. They will be discussed within the context of the Objectives for Reform set out in Chapter 1. While there have been many interesting theoretical ideas in relation to environmental assessment and licensing that have been provided to the Commission, the recommendations have been largely based on recognized "best practice" and legal and policy options that are currently in use in other Canadian jurisdictions.

A. Aboriginal Communities and Environmental Assessment

Manitoba is home to roughly fourteen percent of the total Canadian Aboriginal population.[300] There are sixty-three First Nations communities in Manitoba, many of which are located in isolated northern communities. The Métis community in Manitoba makes up about seven percent of the provincial population, with Winnipeg being home to the largest urban Métis community in Canada.[301] There are also a small number of Inuit people living in Manitoba, with most residing in Winnipeg.[302]

Despite the fact that many of these Aboriginal communities are located in the most environmentally sensitive areas of the province and possess important knowledge about the intricacies of their local ecosystems, there are currently no provisions in *The Environment Act* that assign Aboriginal communities with a specific role in the environmental assessment and licensing process.[303] This lack of a mandatory role is common across Canada and is in large part due to the procedural nature of such regulatory schemes that are designed with a focus on proponents who are often private business entities with no connection to government. Since the duty to consult under section 35 of the *Constitution Act, 1982* lies with the government,[304] proponents generally do not have an official role within the Crown consultation process.[305] Therefore, when a proposed development is seeking approval from the government, potentially affected Aboriginal communities have the option to participate in a number of different review processes. In Manitoba this usually involves: 1) the environmental assessment process under *The Environment Act*; and 2) section 35 consultation under the Constitution. Since there is very little coordination between these processes in Manitoba, a section 35 consultation may occur before, at the same time, or after the environmental assessment and licensing process under the Act takes place. This issue of inconsistent timing was identified by a range of participants as extremely problematic.

There is often significant overlap between the environmental assessment and section 35 consultation processes since many of the same parties are involved in both processes and the issues considered are often very similar. As well, the results from both processes form the basis of the information considered by the Director/Minister when deciding whether to grant a proposed development an Environment Act licence or not. This overlap often causes significant confusion regarding the role of Aboriginal communities in Manitoba's environmental assessment and licensing processes.[306] A range of participants discussed this confusion and suggested that better educational resources and guidance be developed to help provide insight about the differences between section 35 consultation and environmental assessment under the Act for all parties involved in the environmental assessment process.

Almost all participants were supportive of an increased role for Aboriginal communities in the environmental assessment and licensing process but most were unable to provide examples of how this idea could be incorporated into the current legal framework. Based on the input that the Commission received from participants, there are several issues that were consistently identified as problematic and requiring legal reform:

- Timing and coordination of processes[307]
- Education and guidance[308]
- Incorporation and consideration of Aboriginal Traditional Knowledge[309]

Many participants also drew the Commission's attention to the recommendation made in COSDI[310] and the international commitments made by Canada.[311]

Further research is needed to determine whether or not *The Environment Act* should include specific reference to the consultation obligations set out under section 35 of the *Constitution*. Therefore the Commission cannot make recommendations in relation to many of the issues identified by participants that are associated with the duty to consult and the legal processes that stem from section 35 of the Constitution. The exclusion of these issues from the recommendations made in this Report does not mean that the Commission views these issues as unimportant. Instead, such exclusion reflects the inability of the Commission to properly address this very politically and legally complicated subject matter within the scope of the project.

However, the Commission recognizes that Aboriginal participants can and should play an important role in Manitoba's environmental assessment and licensing process. Certain recommendations in this Chapter will address ways in which the identification and participation of these communities and the consideration of Aboriginal Traditional Knowledge could be formalized in Manitoba's provincial environmental assessment and licensing process.[312]

Recommendation:

The Government of Manitoba should work in partnership with Aboriginal communities to determine and implement the best means of improving the involvement of Aboriginal peoples in Manitoba's environmental assessment and licensing process, and the integration of Aboriginal Traditional Knowledge into the decision-making process.

B. Sustainability Assessment

Sustainability assessment is considered to be the fourth stage of environmental assessment evolution and has been discussed by government working groups, such as MRTEE, as a possible next step for Manitoba's environmental assessment regime since the early 1990s.[313] There are many definitions of sustainability assessment and there is widespread discussion of how such a process could be integrated into existing legal frameworks.[314]

Sustainability assessment, also known as integrated assessment, attempts to address the economic, social and environmental effects of a particular initiative (the 'three pillars'), and the interactions among these effects. The purpose of sustainability assessment is not to define whether a proposed undertaking is itself sustainable; rather it looks at whether or not the proposal is the best option for helping society progress towards sustainability.[315]

Environmental assessment and sustainability assessment are both concerned with the connections between the environment and human activities. Both concepts involve consideration of the three pillars but such effects are given different weight. In contrast to sustainability assessment, which attempts to integrate attention to economic, social and environmental interests, minimize trade-offs and seek mutually reinforcing gains in all three areas, environmental assessment typically has a narrower scope. With some exceptions, under federal and Manitoba law environmental assessment is "limited in scope to environmental effects, and the social and economic [effects] associated with the environmental effects".[316] Also, environmental assessment is usually focused on mitigation of adverse effects while sustainability assessment also includes enhancement of beneficial effects. Defenders of narrower environmental assessment have pointed to its value as a process focused on the biophysical environment and putting those effects first and foremost, which means that environmental considerations are given more weight than social and economic ones. The common disadvantage is leaving trade-offs between biophysical and socio-economic objectives to be addressed in other, often less open and participative venues.

Although the general idea of sustainable development has enjoyed widespread acceptance, and the idea of sustainability assessment has been discussed for decades, there continue to be unresolved debates about the relationship between environmental assessment processes and sustainable development. These continued conflicts among academics, experts and practitioners are often viewed as an impediment to conceptualizing a legislative sustainability assessment framework and putting it into practice in jurisdictions like Manitoba. However, in actual practice there seems to be remarkably little disagreement over the basic requirements for process towards sustainability.[317] A good example is the basic sustainability principles already identified by the Government of Manitoba in *The Sustainable Development Act*, as set out in Schedule A. Sustainability assessments have also been undertaken successfully in a variety of contexts, although not yet in Manitoba.[318]

Sustainability Assessment and Manitoba:

Despite the government's recognition of sustainable development for the last few decades, there is still disagreement on how to best incorporate such concepts into Manitoba's legislative framework, as evidenced by some of the feedback the Commission has received on this issue.

Many participants directed the Commission's attention to the COSDI recommendations in support of sustainability assessment.[319] However, other participants had mixed feelings about sustainability assessment and direct linkages to *The Sustainable Development Act*.

Participants largely agreed that there is a need to improve the sustainable development framework in Manitoba. However, there was widespread disagreement about who should bear the responsibility of assessing the sustainability effects of new developments, with many participants arguing that it should be the responsibility of the government. Participants pointed out that it may be unreasonable to expect a proponent to assess a proposed development's sustainability effects without clear standards, procedural guidance and criteria. This need for clarity in relation to sustainability and sustainable development was consistently expressed by participants, especially when there are different sustainability requirements that apply to developments in Manitoba, depending on the type of development, but no specific requirements in *The Environment Act*.[320]

As many participants pointed out, there appears to be a need for policy and planning level initiatives, which would be the responsibility of government, to specify sustainable development criteria for Manitoba generally, to clarify how these criteria would be further elaborated for application at the individual project level, before sustainability-based assessment requirements can be applied effectively in a legislated process. These initiatives would need to be accompanied by education and training programmes to facilitate well-informed sustainability assessment implementation, as discussed by MRTEE in their Concept Paper, *Educating for Sustainable Development: A Sustainable Development Education Strategy for the Province of Manitoba*.[321] Capacity development would be required for government, proponents, practitioners and others involved in the assessment process before a new sustainability-based assessment process is enacted.

The Environment Act: Recommendations

In light of the continued development of the sustainable development framework in Manitoba, including the possible reform of *The Sustainable Development Act*[322], more information (which is not yet available) would be needed before a recommendation could be made in regard to the particulars of legislative reforms in favour of a transition to a sustainability assessment framework. Since most of the institutional and technical requirements for sustainability assessment are not yet developed in Manitoba, it would be unrealistic and unproductive to expect proponents, particularly those in the private sector, to engage in sustainability assessment for individual proposals at this point in time. However, stronger linkages within Manitoba's environmental assessment and licensing process to the concept of sustainable development are not unrealistic, and some options for improving this connection will be suggested in later sections of this Chapter.

Although a move towards sustainability assessment will be not addressed in this Report, the Commission is not disregarding the importance of continuing efforts to incorporate sustainability assessment into Manitoba's legislative framework. Much of the work that was done by government in the 1990s remains relevant today and the issue of sustainability assessment has continued to be addressed by participants in recent environmental regulatory proceedings. Manitoba already has its own provincially specified and officially recognized sustainability principles, and is therefore well positioned for a possible transition due to this accepted basic understanding of what sustainability generally entails. There may even be provision within *The Environment Act* that could allow for the incorporation of sustainability assessment principles. For example, the Act "provides for the recognition and utilization of existing effective review processes that adequately address environmental issues".[323] The issue of sustainability assessment should remain within the environmental discourse of government, proponents, and practitioners, and more work should be done by all parties to move Manitoba towards this next phase of environmental assessment.

Recommendation:

The Government of Manitoba should revisit the recommendations made by COSDI and work in partnership with the public, proponents, legal practitioners, Aboriginal communities and other interested parties to develop a strategy and timeline for transitioning Manitoba to a system of sustainability assessment.

C. Manitoba's Environmental Assessment and Licensing Process

When *The Environment Act* was introduced in 1988, Manitoba's environmental assessment and licensing process was one of the most progressive in the country. The provincial government had recognized the problems associated with an environmental assessment process based on government policy, such as a lack of enforceability and consistency, and created this legislation to ensure that proposed developments in Manitoba were properly scrutinized to maximize the protection of the environment. Today, Manitoba's environmental assessment and licensing process remains in the forefront for some aspects of the system, such as the provision of participant assistance, but there is still a need for the government to undertake a thorough review of the Act. As identified by those who participated in this project, there is a strong need to modernize the assessment and licensing process in Manitoba to ensure there is more process certainty, transparency, opportunities for meaningful public participation, and that the overall system is more comprehensive.

Manitoba's current environmental assessment and licensing process is described in the previous Chapter. As discussed, this process involves seven basic steps which often overlap and/or can be by-passed at the discretion of government decision-makers:

1. Proponent submits an Environment Act Proposal

2. Environment Act Proposal is reviewed
3. Proponent is requested to provide further information
4. Opportunity for public hearing
5. Licensing decision is made
6. Appeals and judicial review
7. Post-licensing follow-up

This section will discuss these steps and other related elements of the Act that have been identified as problematic and in need of reform. Recommendations for reform are provided to address these issues, as well as other features of environmental assessment and licensing that have been deemed missing from the Act.

1. Administration and Organization

Unlike in many other jurisdictions, the environmental assessment process in Manitoba is directly connected to the licensing of a development. There is often no need to seek additional licences once the environmental assessment has been performed and a license issued.[324] This combined process can result in a much more simplified approval process for proponents in Manitoba, as compared to some other jurisdictions in Canada. However, this usually only applies to projects categorized as Class 1 developments.

Creating a system that is efficient for proponents is always one of the goals of environmental assessment and licensing design. However, this efficiency must be balanced with other factors, such as ensuring that developments that pass through the regulatory process are thoroughly assessed and that the public is given meaningful opportunity to provide input throughout the entire process in order to ensure transparency and comprehensiveness.

While these individual elements of the process are important and will be addressed later in this Chapter, the starting point for creating an environmental assessment and licensing process that addresses and balances the concerns of all parties involved in the regulatory system is the legislative framework as a whole. The purpose, language, and organization of the Act sets the foundation for the whole process and plays a big role in creating efficiency, process certainty, transparency, and ensuring the public is meaningfully involved. As suggested by Wood, environmental assessment systems should have "a well-founded legislative base with a clear purpose, specific requirements and prescribed responsibilities."[325]

This section will address the importance of ensuring that Manitoba's environmental assessment and licensing process is based on clear and specific legal provisions and will address the Act's organization, purpose, terminology, and definitions.

A) Organization of the Act:
The environmental assessment and licensing process is currently integrated into a large portion of *The Environment Act* and there are five related regulations.[326] The sections of the Act that are related to the environmental assessment and licensing process are as follows:

- sections 6 and 7 regulate the Clean Environment Commission
- sections 10-19 cover the environmental assessment process
- section 27 and 28 cover the appeal process for licensing
- section 41-44 discusses the power to make regulations
- section 47 addresses confidential information

The remainder of the Act is focused on environmental management, and has application to the licensing process since it provides for the administration of the Act and sets out enforcement powers and processes. Titles are used to group sections of the Act, for example, the sections addressing the production and review of EAP, possible requirements for further information, and related discretionary decisions are currently grouped together based on the applicable Class of Development.[327] However, such titles are not consistently used throughout the Act and the majority of the Act (section 12.0.1 to the end of the Act – s. 57) appears to fall under the title "Miscellaneous Provisions Respecting Proposals".

While the majority of the environmental assessment and licensing process is addressed at the beginning of the Act and these provisions are for the most part grouped together, the fact that there are various other provisions throughout the rest of the Act that apply has made the legislative process as a whole unclear to the public, proponents, and even legal practitioners. Many participants identified concerns with the current organization of the Act for this reason and a range of suggestions were provided to help address this issue.

Some participants suggested that the current Act is not working effectively and that a good solution would be replacement with two acts: one for environmental assessment and one for environmental management, streamlining the system for both processes. Other options suggested include a reorganization of the Act with defined Parts such as: Administration, Clean Environment Commission, Environmental Assessment, Enforcement, etc. to more clearly group the sections related to environmental assessment and licensing together. Another suggestion was to create a separate environmental assessment regulation or a series of regulations that comprehensively describe the various elements of the process.

Legislative Frameworks in Canadian Jurisdictions
The suggestions provided by participants are already reflected in the various legislative regimes of other jurisdictions in Canada. Eleven of the fourteen jurisdictions in Canada have created specific environmental assessment legislation either in the form of a separate environmental assessment act or an environmental assessment regulation.[328] Like Manitoba, the remaining

jurisdictions have environmental assessment requirements but they are either addressed under federal legislation (e.g. Northwest Territories) or are identified under broader Provincial environmental legislation (e.g. Prince Edward Island).

Many of these Acts and regulations are clearly organized and have been divided into corresponding Parts, Divisions and Sections that are clearly titled. Regulations that further describe the specifics of these Parts and other aspects of the process are common. For example, Alberta's *Environmental Protection and Enhancement Act (EPEA)*, which addresses more than just the environmental assessment process, is divided into 'Parts' which are sub-divided into 'Divisions'.[329] There are 31 corresponding regulations that specifically address the various elements of the Act.[330] Yukon's *Environmental and Socio-economic Assessment Act*[331] is divided into two Parts with two corresponding regulations[332] and British Columbia's *Environmental Assessment Act*[333] is divided into six Parts with six corresponding regulations.[334]

The Environment Act: Recommendations

Unless the various steps in the environmental assessment and licensing process are clearly set out in the Act or in a binding regulation, there will be a lack of transparency and process certainty for the various participants in the process. It is also important that the legislative process is adhered to by all stakeholders and that accepted procedures are not able to be changed arbitrarily, which is why the whole process, or at least a framework of the basic steps, should be set out in the legislation for enforcement purposes.[335] The more specific details of each stage in the process do not need to be addressed in the legislation as long as there is appropriate additional guidance available, such as corresponding regulations and government issued guidance documents.

It is also important to clearly outline all of the procedures involved in the environmental assessment and licensing process for transparency purposes, so that proponents, consultants, the public and relevant authorities can gain an overview of the entire process.[336] Wood suggests that "this outline should include the time allocated to each stage in the process (a necessary requirement to prevent it from becoming over-lengthy) and any charges involved in it." [337]

For Manitoba's environmental assessment and licensing process to function effectively and in a transparent manner, the current ambiguities of the Act need to be minimized. As suggested by a range of participants, one method of addressing this involves better organization of the Act. While the Commission considered the possibility of an entirely new piece of legislation addressing environmental assessment and licensing, it was determined that the process could stay within the framework of *The Environment Act* as long as the Act was amended to include a clearer division of the sections that pertain to this process and the other sections of the Act relating to enforcement, pollution control, and abatement projects. The legal requirements relating to assessment and licensing should be clearly distinguished from those relating to other types of actions under the Act so that no confusion exists between different processes.[338]

Participants also suggested the addition of new regulations to address aspects of the process such as the production of environmental assessment reports and public participation, and the Commission is in agreement. These specific regulations will be discussed later in this Chapter. Since proponents require as much certainty as possible in determining whether assessment is likely to be required, clear and detailed information about actions, criteria, thresholds and screening procedures generally should be available. Such guidance is helpful not only to the proponent, but also to all the other participants in the environmental assessment process.

Recommendations:

1.1 *The Environment Act* should be re-organized and divided into separate "Parts" that clearly indicate which sections of the Act relate to the various actions covered by the Act including, but not limited to:

- **Administration**
- **The Clean Environment Commission**
- **Environment Act Proposals**
- **Environmental Assessment Reports**
- **Licensing and Implementation/Follow-up**
- **Enforcement**

1.2 The existing regulations and guidance materials should be amended or replaced with new regulations and guidance documents should be developed that correspond to the environmental assessment and licensing provisions of the Act and describe the specific elements of the process in more detail. This includes but is not limited to:

- **Environmental Assessment Reports**
- **Public Participation**
- **Enforcement**
- **Timelines**

B) Legislative Purpose

The function of a purpose statement in any statutory law is to reveal the purpose of the legislative regime and set out the principles, policies, and objectives the law is supposed to implement and/or achieve.[339] Courts often rely on the purpose statement in interpreting legislation and the Supreme Court of Canada has held that a purpose statement "gives context for the entire Act."[340]

Since the legislative purpose of a statute is usually formulated to reflect the specific characteristics, ideals, and government structure of a jurisdiction, it is not uncommon for legislation addressing a similar issue or process to contain purpose statements that are considerably different from each other. This variance is seen in many regulatory contexts in Canada, including environmental assessment and licensing legislation.

Legislative Purpose in Canadian Jurisdictions:
The purpose of *The Environment Act* is set out in s. 1(1) which provides that the purpose of the Act is to "develop and maintain an environmental protection and management system." Environmental assessment is stated as part of this system which also involves public consultation and recognition of the responsibility that elected government officials have as environmental decision makers, among other considerations.[341]

The legislative purpose of environmental assessment legislation in other Canadian jurisdictions includes the promotion of a number of other purposes and principles. Examples of such additional elements include, but are not limited to:

- Sustainable development[342]
- Strategic environmental assessment[343]
- Environmental leadership[344]
- Shared responsibility of citizens to protect, enhance and wisely use the environment[345]
- Cooperation with governments of other jurisdictions to prevent and minimize transboundary environmental effects[346]
- Polluter pays principle[347]
- Precautionary principle[348]
- Recycling[349]

Some jurisdictions, like Nova Scotia, have incorporated stronger provisions for public participation and access to information and recognize the goal of "providing access to information and facilitating effective public participation in the formulation of decisions affecting the environment, including opportunities to participate in the review of legislation, regulations and policies and the provision of access to information affecting the environment."[350]

Others, like the Northwest Territories, have taken a different approach and have included a legislative purpose for the regulatory body in charge of administrating the environmental assessment process that explicitly includes an objective "to ensure that the concerns of aboriginal people and the general public are taken into account in the environmental assessment and environmental impact review of developments."[351] Similarly, the *MVRMA* also assigns guiding principles for the environmental assessment process including a recognition of "the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the *Constitution Act, 1982* applies and who use an area of the Mackenzie Valley".[352]

The Environment Act: Recommendations

The Commission has received feedback throughout the project identifying a need to review and update the purposes of *The Environment Act*. The Act has not been significantly amended in almost three decades, during which time there have been many changes in the underlying concepts, values, technologies and legislative mechanisms associated with environmental assessment and licensing in Canada. The Commission recognizes the importance of ensuring that Manitoba's environmental assessment legislation reflects the modern values and interests of Manitobans. Therefore, the Commission recommends that the Government of Manitoba, in partnership with the public, proponents, legal practitioners, Aboriginal peoples and other interested parties evaluate the current purposes of the Act and make amendments accordingly.

Recommendation:

1.3 The Government of Manitoba, in partnership with the public, proponents, legal practitioners, Aboriginal communities and other interested parties, should evaluate whether the current purpose statement of *The Environment Act* as set out in Section 2 is still representative of the values and interests of Manitobans and if amendments should be made. Possible additions to be considered include, but are not limited to:

- **Sustainability;**
- **Precautionary principle;**
- **Recognition of aboriginal peoples in Manitoba and their rights under s. 35 of the *Constitution Act, 1982*;**
- **Strategic environmental assessment;**
- **Environmental leadership;**
- **Intergenerational equality;**
- **Polluter pays principle;**
- **Consideration of the feedback received through public participation mechanisms when exercising discretionary powers granted by the regulatory scheme.**

C) Terminology and Definitions:

The language contained in any piece of legislation plays an important role in determining the application of the legal elements set out within the statutory framework. The language choices of the individuals involved in developing such legislation and the ways in which these terms are defined within the Act can help to frame the scope of legal processes like environmental assessment, assist with making the process transparent to the public and proponents by clarifying what was meant by a certain term and assist with ensuring that legislative processes in different jurisdictions are more compatible. Defining terms also improves consistency from project to project and improves the fairness of the process as a whole.

As will be discussed in almost every section of this Chapter, there are a wide variety of terms used in environmental assessment legislation across Canada. The ways in which these terms are used and the definitions that have been provided for such terminology also varies among jurisdictions. For example, to describe the actual action that is being proposed by a proponent and then assessed based on the corresponding legislative requirements, the term "project" is used by the federal environmental assessment process as well as a number of provincial/territorial processes including Alberta[353], British Columbia[354] and New Brunswick[355]; the term "development" is used in Manitoba[356] and Saskatchewan[357]; and the term "undertaking" is used in Newfoundland and Labrador[358], Nova Scotia[359], Ontario[360] and Prince Edward Island[361].

This difference in terminology also makes understanding legislative processes difficult for proponents, the public, and even legal practitioners, especially when a variety of different definitions are assigned to the same term, such as "environment", depending on the jurisdiction. Many participants identified their confusion and made a variety of suggestions in relation to the terminology of Manitoba's Act. For example, an expansion of the definition for "development" was suggested in order ensure both physical projects and strategic level plans are included in the scope of the environmental assessment process.[362]

This section will not go into detail for many of the suggested additions or amendments included in the recommendations below since they will be discussed in later sections of this Chapter. However, the term "environment" was identified for reform by many participants for a variety of different reasons, particularly because this term helps establish the scope of Manitoba's environmental assessment process as a whole.

"Environment"

The concept of "environment" in environmental assessment evolved from an initial focus on the ecological or biophysical components to a wider definition, including the physical-chemical, biological, visual, aesthetic, cultural and socio-economic components of the total environment. In Manitoba, the definition of environment still reflects early conceptions of environmental assessment and only includes a consideration of bio-physical factors.

Under section 1(2) of the Act, "Environment" is defined as: a) air, land and water, or b) plant and animal life, including humans. This focus on bio-physical components was identified as outdated and problematic by participants, especially since the definition of environment in other Canadian jurisdictions is broader and includes socio-economic and cultural aspects, and the interactions among the various components.

For example, *CEAA, 2012* defines environment as the components of the Earth, and includes: *a*) land, water and air, including all layers of the atmosphere; *b*) all organic and inorganic matter and living organisms; and *c*) the interacting natural systems that include components referred to in paragraphs *a*) and *b*). The last part of this definition is important since it allows for a consideration of cumulative effects, a concept that will be discussed later in this Chapter.

Other jurisdictions, like Ontario and Newfoundland and Labrador have included additional components in their definitions, such as "the social, economic, recreational, cultural and aesthetic conditions and factors that influence the life of humans or a community"[363], "any building, structure, machine or other device or thing made by humans"[364], and "any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities"[365]

***The Environment Act*: Recommendations:**
As identified by participants, the definition of "environment" should be expanded to ensure that the scope of the Act meets the modern standards set by other jurisdictions in Canada. Although other parts of the Act, such as the definition for "development" extend the scope of environmental assessment to include considerations of socio-economic and cultural conditions caused by environmental effects, it is important to expand the definition of "environment" to ensure consistency throughout the Act and to make it easier for the participants in the process to understand the scope of the legislative framework.

There is also a need to add a number of different terms to the Act or to amend the definitions that currently exist. Further explanation will be provided for some of these suggested terms and amendments in the appropriate sections of this Chapter. Please see Appendix A of this Report for a list of commonly used terminology in environmental assessment and licensing processes that should be considered for inclusion in the Act.

Recommendations:

1.4 The definition of "environment" found in Section 1(1) of the Act should be amended or replaced with a definition that includes, but is not limited to, a consideration of:

- **air, land and water;**
- **all layers of the atmosphere;**
- **all organic and inorganic matter and living organisms;**
- **any building, structure, machine or other device or thing made by humans;**
- **social, cultural, economic, and aesthetic conditions and factors that influence the life of humans or a community;**
- **a solid, liquid, gas, odour, heat, sound, vibration, radiation or other produced energy resulting directly or indirectly from the activities of humans; and**
- **any part or combination of the foregoing and the interrelationships among any two or more of them.**

1.5 Section 1(1) of the Act should be amended to include definitions for the following terms:

- **Aboriginal Traditional Knowledge**
- **Environmental Assessment Report**
- **Significance**
- **Effect**
- **Impact**

2. Public Participation

Public participation plays an important role in achieving environmental goals and helps to ensure that political actors are properly informed and the interests of the public are represented in their decisions.[366] This is especially important for environmental regulatory systems since decisions about when, where and how projects take place can result in significant adverse effects to the land, air, and water. Public participation helps provide the decision-maker with a full range of information, and ensures that the administration of environmental licensing schemes take into account perspectives other than that of the proponent.[367] It is also important to include the public in such processes so that new ideas and potential alternatives to the proposed development are introduced. Public participation can provide a measure of accountability and facilitate monitoring for regulatory agencies and decision-makers. The more that public contributions are meaningfully incorporated into environmental decision-making processes, the more trust and confidence the public will have in such regulatory systems and their administrators. A final and very important result of adequate public participation is the establishment of awareness among the general public and within the affected communities about the potential effects of an activity and what is proposed to mitigate and avoid those effects.[368]

Until relatively recently, public participation in policy making was considered broadly satisfied by a democratic political system. By voting for political representatives, the public gave politicians the right to make decisions on their behalf.[369] Communication between authorities and laypersons was primarily one-way, usually through the dissemination of information in a top-down approach. The more modern approach to stakeholder[370] and public participation described in the academic literature has shifted the emphasis to two-way communication and dialogue in a more bottom-up approach. The theoretical goal of this modern approach is to involve all interested parties as early as possible in the decision-making process, and to solicit as broad a range of opinions and knowledge as possible.[371]

To date, environmental protection processes and legislation which address the role of the public have been designed based largely on the assumption that if a process is put in place it will be properly facilitated, and the public will participate actively, resulting in better decisions. The rule makers have assumed that if an opportunity is provided in appropriate circumstances so that the public may provide input at crucial decision-making points in the process, the public will be ready, willing and able to step up and make constructive and convincing contributions, and that those contributions will be incorporated into project design and decision-making.[372] Unfortunately, this has not necessarily translated into actual practice for many legislative systems that aim to protect and conserve the environment. Critics of current regulatory schemes have suggested that these assumptions about the capacity of the public to contribute in a meaningful way are unrealistic and have led to the development of public participation mechanisms that actually have the effect of discouraging participation, encouraging conflict and fostering distrust among the participants.[373]

Why is Public Participation Important?

Public participation can be described as "a vehicle for individual and community empowerment" when opportunities for meaningful participation are incorporated throughout environmental regulatory proceedings.[374] There is a wide range of interdisciplinary benefits associated with public participation that includes, but is not limited to:

- Enhancing the legitimacy of proposed projects;
- Ensuring a comprehensive range of factors on which to base decisions is available;
- Providing access to local and traditional knowledge from diverse sources;
- Ensuring that projects meet the needs of the public;
- Broadening the range of solutions considered;
- Encouraging more balanced and accountable decision-making; and
- Reducing the level of controversy associated with a problem or issue.[375]

There are many diverse and important benefits enjoyed when meaningful public participation is adequately incorporated into any regulatory proceeding. This is especially true for environmental assessment and licensing regimes since decisions that have the potential to cause adverse environmental effects are always controversial and involve a broad range of stakeholders with interests that are often conflicting or competing. Therefore, it is extremely important that environmental assessment legislation and the policy decisions associated with the application of these legal frameworks are developed in a way that creates meaningful opportunities for public participation and the incorporation of public opinion into the design and approval of new and existing projects.

Public Participation in Canadian Jurisdictions:

There are a variety of different regulatory tools used in environmental assessment and licensing regimes across Canada in order to encourage the participation of interested and affected members of the public and to incorporate the input of these participants into the administrative decisions made throughout the process. These tools will be discussed as they pertain to various aspects of environmental assessment and licensing regimes, which includes: methods of engagement, capacity building, timing and opportunities for public input, notice and timelines, access to information, and participant assistance.

Methods of Public Engagement

There are a number of different methods used in Canadian jurisdictions to engage the public in environmental regulatory processes which includes formal hearings, advisory committees, alternative dispute resolution and the use of petitions.[376] The most formal means of participation is through a public hearing. In Canada, all jurisdictions have some legislative provision that enables administrators to call a public hearing. In Manitoba, the Clean Environment Commission undertakes such hearings at the discretion of the Minister. These public hearings are normally only held for controversial Class 2 and 3 developments. As discussed, this means that only about 1% of developments require a public hearing in Manitoba.

Manitoba's Act gives the Minister authority to establish and appoint members of advisory committees as the Minister considers desirable for the purpose of providing advice and assistance in carrying out the objects and purposes of this Act.[377] The TAC, discussed in a later section of this Chapter, is one such committee established under this section. Manitoba is also one of the few jurisdictions that provides for the use of alternative dispute resolution in environmental assessment and licensing proceedings. Under the Act, the Minister is granted the authority to appoint an environmental mediator when it is deemed advisable and where the conflicting parties (which could include members of the public) concur.[378] The CEC may act as such a mediator when requested by the Minister.[379] The Act does not designate at which point during the environmental assessment process the Minister may refer parties to mediation, nor does it set a time limit on the mediation.[380] The results of any mediation completed must be reported to the Minister within six weeks.[381]

Other jurisdictions in Canada have explored other options for public engagement. One such option is the use of petitions, which provide a means of bringing the concerns of the public to the attention of government authorities. At the federal level, there is a formal environmental petition process under the *Auditor General Act* that provides a means for Canadians to bring their concerns about environmental issues, including environmental assessments, to the attention of federal Ministers and departments and to obtain a response to their concerns.[382] Such petitions are used to prompt government action including follow-up on alleged violations, and changes or clarifications in policies and practices. Petitions have been used in other jurisdictions, like New Brunswick, as a means of showing how many members of the public have serious concerns about the effects of proposed projects like the Emera Brunswick Pipeline Project.[383] A petition mechanism was also discussed in Alberta's environmental assessment model legislation as a means of allowing the public to participate at a higher level in the environmental assessment process and providing input into discretionary decisions made by administrators in the context of triggering environmental assessments.[384]

Another option for public engagement that was suggested by participants is the public review process under Parts IV and V of Ontario's *Environmental Bill of Rights* ("EBR").[385] The EBR grants Ontario citizens environmental rights that allow them greater opportunity to participate in environmental decision-making schemes and allow for stronger enforcement mechanisms. Sections 74 to 81 of this Act gives citizens the right to request an investigation of alleged violations of environmental statutes; and sections 61 to 73 give the public a right to request a review of existing policies, regulations, Acts, and instruments on the grounds that amendment or repeal is necessary to protect the environment. Although the legislative framework established under the EBR has been criticised for granting too much discretionary power to decision-makers, the EBR is worth considering as a model due to the breadth of environmental issues that it allows to be addressed.

Capacity Building

An important element of public participation is the ability of the public to access enough information to effectively discuss the situation and provide useful input. In Canada, most jurisdictions have developed comprehensive guidelines and regulations that set out specific requirements for the submission of proposals, public participation processes, and other important submissions that aim to clarify the ways that the public may participate in environmental assessment processes and what types of information they should have access to. In Manitoba, the Department of Conservation and Water Stewardship has produced several guidance documents that describe the environmental assessment process generally, and provide information about the preparation of an EAP. Since the Act grants the CEC the authority to determine its own rules for the hearing process, the CEC has produced guidance materials discussing the hearing process and participation in such hearings.[386] The *Participant Funding Regulation* also provides some guidance as to the requirements for participant funding.

Other jurisdictions have created much more comprehensive guidance and education programs. For example, the federal government provides a range of guidance documents that apply to the federal environmental assessment process and has also offered education seminars such as 'Introduction to the Canadian Environmental Assessment Act, 2012'.[387] The CEAA has also funded workshops in communities potentially affected by a proposed undertaking that explained how the environmental assessment process works and how members of the community could most effectively participate. In the territories, there has been an increasing amount of funding provided, from both government and proponents, to Aboriginal communities in order to increase their capacities to collect and communicate Aboriginal Traditional Knowledge.

Timing and Opportunities for Public Input

In Canada, public participation can occur at all stages of project planning including the normative level (in which decisions are made to determine what should be done), the strategic level (in which decisions are made to determine what can be done), and the operational level (in which decisions are made to determine what will be done).[388] Proponents often provide public participation opportunities during the development of a project proposal, but public input at this stage is usually discretionary on the part of the proponent. Governments often allow the submission of written comments by the public at various points of the licensing procedure, even if no public hearing is required.

In Manitoba, there is only one mandatory public comment period, which occurs after the submission of an EAP.[389] However, public participation is encouraged throughout the process and there are usually public comment periods that occur to assist with the review of scoping documents and environmental assessment reports when they are required.[390] If a proponent chooses to consult with the public prior to or during the environmental assessment process, the Director and Minister may take such public engagement activities into consideration, and also may require the proponent to submit the results of these consultation efforts to the CEC if a hearing is held.[391] The Act does not place restrictions on who may provide input during these public participation opportunities and there are no formal timelines for the submission of public comments, although such time restrictions are generally established and communicated when the government gives notice.[392] If a public hearing is held by the CEC in regard to a completed EIS, interested parties have the ability to contribute on three different levels of involvement.[393]

In *Swampy Cree Tribunal Council v Clean Environment Commission*[394], the Manitoba Court of Queen's Bench looked at public participation in the context of developing terms of reference for a CEC hearing and scope of an EIS. The applicant argued that both the Minster and the Director failed to comply with provisions of the Act[395] by precluding the public from having input into the determination of both the terms of reference and the scope of the EIS. In dismissing the application, the court took a narrow interpretation, concluding that "there is no provision in the *Act* for public input into the form or content of an environmental impact statement or the terms of reference and guidelines directed by the Minister to the Commission. The latter are administrative acts solely within the prerogative of the Minister."[396]

Other jurisdictions have taken a variety of approaches to incorporating the public in various stages of licensing and project development. In the Northwest Territories, proponents have been required to incorporate members of the public at all levels of development through the establishment of review panels and boards that ensure compliance with land-use agreements, land claim settlements, and other co-management agreements with Aboriginal communities and the government. In Newfoundland and Labrador and Nova Scotia, public participation mechanisms occur throughout the assessment process including during the registration stage (Nova Scotia) and the development of a project proposal. Mandated public participation during post-licensing stages is also a possibility in some jurisdictions as part of monitoring and follow-up processes. This will be discussed further in later sections of this Chapter.

Some jurisdictions, like Alberta and the federal government, have placed restrictions on the members of the public who are allowed to contribute comments during decision-making processes. Under *CEAA, 2012* participation under s. 28 is restricted to "interested parties," and in Alberta participation is limited in some aspects of the licensing process to those who are "directly affected."[397] There are also statutory requirements in Alberta and at the federal level that establish specific timelines for periods of public comment.

Notice:

Notice is an important aspect of public participation since it is difficult for the public to adequately participate if they are not properly informed of the situation and provided with comprehensive information. Notice should be provided in such a way that it is brought to the attention of interested parties well before decisions are made. All Canadian jurisdictions have notice provisions in the statutes that regulate their environmental assessment and licensing process but there is little consistency in how and when notice must be provided. Generally, notice involves advertisement through local print/broadcast media and online through the overseeing department's website.

In Manitoba, public notice occurs once a completed EAP is submitted to the EAB. These EAPs are distributed to public registries, local libraries and government offices.[398] Media advertisements are developed and usually placed in a local newspaper/online that provides a summary of the project, names the locations where the EAP is available and requests public comments. Manitoba courts have interpreted the Act's public notice provisions narrowly following the Manitoba Court of Appeal decision of *Caddy Lake Cottagers Association v Florence-Nora Road Inc.*[399] in which Justice Twaddle, in concurring judgements, held that "the *Act* provides for public notice, not notice to persons who are particularly affected by the proposed development."[400] In his view, a single advertisement in a Saturday edition of the Winnipeg Free Press constituted reasonable notice since notice only had to be given to the public at large, and did not have to be circulated to individuals who may be particularly affected by the development.[401]

Other jurisdictions have gone further than Manitoba and require that notice be given to all potential interested and affected parties as opposed to just the 'public' and have created a registration system that allows interested and involved parties to receive information throughout the licensing process. This system requires that a record of all interested and affected parties be accessible to anyone who submits a request.

Access to Information

Meaningful participation in environmental assessment and licensing processes requires sufficient access to information from the proponent and government department controlling the licensing process. Adequate access to information, the quality of such information and the way the information is presented affects the value of participation processes. In most Canadian jurisdictions, the basic means of public access to information is through a registry system. In most cases, this information is available online through the department website and often on the proponent's website.

In Manitoba, section 17 of the Act requires the establishment and maintenance of a public registry that must contain specific documents for each proposal received by the government. As well, section 14 requires that when a minor alteration to a licence is approved, a copy of the approval and the name of an EAB contact person must be filed in the public registry. All material is available at the Manitoba Eco-Network Library, the Winnipeg Public Library, and the Legislative Library and through the Manitoba Conservation website.

Federally, the *CEAA, 2012* has comparatively strong provisions for access to information. The specific documents that must be made available are set out in ss. 78 to 82, which also establish the CEAA Registry and website. All relevant information must be made available in a manner that ensures convenient public access.[402] Alberta's model environmental assessment legislation includes specific requirements for the information that must be made available to the public such as: public notices; any petitions submitted with decisions; all proponent development information, comments and submissions; all information/comments/submissions received from the public and other participants; government correspondence, comments, submissions and decisions; follow-up and monitoring result; and any other information related to approvals or enforcement under the legislation.

Some jurisdictions have also improved the public's access to information in situations where interested participants may not possess sufficient language or educational skills in order to participate in regular licensing procedures. For example, Nunavut's public participation program requirements address obstacles to participation such as language and education levels. The Nunavut Impact Review Board has the authority to require that the proponent provide a non-technical project summary in English and Inuktitut/Inuinnaqtun depending on the region's dialect.[403] Other participation programs require the provision of alternative means of participation for individuals or communities who might not be able to participate in regular processes due to educational deficiencies or a disability.[404]

Participant Assistance

Participant funding plays an important role in the ability of the public to meaningfully contribute to environmental decision-making processes. In most jurisdictions, participant assistance is reserved for large-scale projects, if any is provided at all. Participant funding can play a very important role in increasing the capacity of participants to meaningfully participate since such funding allows individuals and groups that may not possess sufficient experience, education, or language skills to hire individuals such as lawyers, experts, translators, and project managers to help collect and present their information.

Manitoba is a leader in the provision of participant funding.[405] There are only a few other jurisdictions (Alberta, Nova Scotia) besides the federal government that have recently granted funding for participants. Funding in Manitoba is granted in relation to CEC hearings. A participant assistance program can be established for the assessment of any development that, in the opinion of the Minister, is of significant public interest.[406] If applications for assistance are received, the Minister can establish a participant assistance committee to make recommendations to the Minister respecting the requested funding.[407] Section 7 of the *Participant Funding Regulation* sets out the expenditures for which assistance may or may not be granted. Under section 13.2 of the Act, the Minister may, in accordance with the regulations, require a proponent of a development to provide financial or other assistance to any person or group participating in the assessment process.[408]

The Environment Act: Recommendations

The Commission received a variety of input from participants in relation to public participation mechanisms in Manitoba's environmental assessment and licensing process. Such input covered a range of subjects, including the issues discussed above. Although Manitoba is a leader in Canada in respect to some aspects of public participation and the Department has made significant improvements over the last few years, it is clear that change is still needed.

Many participants identified a need to expand the involvement of the public throughout the entire environmental assessment and licensing process. The establishment of more opportunities for the public to provide input during the environmental assessment and licensing process was described as an important way of ensuring that public opinion was better incorporated in the design, assessment and final licensing decision.[409] Participants also directed the Commission's attention to the recommendations made in COSDI in regard to public participation that included a suggestion that the public be involved at all stages of project planning and assessment including the creation and assessment of development plans; the development of project designs and proposals; environmental assessment procedures; licence approvals; and mitigation and follow-up measures. "Early identification and resolution of the issues is advantageous for both the proponent and the public."[410]

Along with more public participation opportunities throughout Manitoba's process, participants also suggested that the means of participation should include more options than formal hearings and written comments. Providing a variety of opportunities for public participation, both in the design of participation processes and during consultation events, the more likely it is that a range of individuals will get involved.[411] Suggestions include the establishment of public advisory committees under section 5 of the Act and the use of mediation throughout the process. Discussions about mediation included support for the COSDI recommendation that mediation be used to reduce the scope of the issues addressed by some parts of the formal effects assessment process, such as the public hearing.[412] Including a more diverse range of options for public participation is seen as an important step in improving public trust and confidence in the regulatory system.

Many of the suggestions for reform received by the Commission addressed a perceived lack of educational resources that clearly describe the various aspects of Manitoba's environmental assessment and licensing system for not only the public, but also proponents. Since the process that proponents must navigate in order to obtain approval for their proposed project under the Act currently relies on a number of discretionary decisions made by government authorities, there is significant lack of process certainty and transparency for all parties, including the public. As suggested by a range of participants, a series of more detailed guidance documents would play an important role in addressing these deficiencies and would assist not only the public, but all participants, with a better understanding of Manitoba's regulatory process.[413] Participants also indicated that education initiatives, like workshops and seminars, aimed at increasing the understanding of all stakeholders involved in the environmental assessment and licensing process would be a good way to address some of the current informational deficiencies.

While the Department should be commended on the efforts that have been undertaken to modernize and improve the public's access to information related to new development proposals and other relevant material that explains Manitoba's environmental assessment and licensing process, many participants provided suggestions for further change.[414] Such suggestions include the addition of prescribed criteria that indicates what should be included in public registry files, the ability to request public documents in a variety of languages, and more user-friendly plain language documents. The importance of addressing the needs of Manitoba's northern and rural citizens, particularly those without access to the internet or translation services was also identified as something the Government of Manitoba should take into consideration when contemplating legislative reforms. Participants also directed the Commission to COSDI's recommendations for the improvement of public registries.[415]

The consideration of public feedback by proponents and decision-makers is also an issue that was discussed by participants.[416] The Act currently contains no provisions that require the consideration of public input during decision-making stages of the process. There are also few opportunities that allow the public to request written reasons for how and why a decision was made.[417] This contributes to a lack of transparency for the public and other stakeholders and often affects the trust of the public. Including prescribed decision-making criteria and opportunities to obtain reasons from decision-makers were suggested reforms that can help address these issues of transparency and trust.

Recommendations:

2.1 Section 1(1) of the Act should be amended to include language that makes the consideration of and incorporation of public input into environmental decision-making a purpose of the Act.

2.2 The Act should be amended to include more mandatory requirements for public participation with legislated timelines. Appropriate points in the process may include, but are not limited to:

- **Determination of the applicable class of development**
- **Review of scoping documents**
- **Review of the CEC terms of reference**
- **Review of an EAR**

2.3 A larger variety of opportunities for the public to participate should be utilized throughout Manitoba's environmental assessment and licensing process. Criteria should be established, in the Act or in the regulations, that sets out when it is appropriate for the Minister to establish a public advisory committee and require the CEC to fulfill its duty to act as a mediator under s.6(5)(d). The addition of a provision allowing for the use of petitions under the Act should also be considered.

2.4 The guidance documents currently available to the public should be amended or replaced with new guidance material that outlines in detail:

- **Available opportunities for public participation and the process involved for each;**
- **A summary of Manitoba's environmental assessment and licensing process that includes specific details about the various available levels of assessment, the role of Aboriginal communities, mandatory and discretionary elements of the current process, etc.;**
- **The requirements for the production and review of EAPs;**
- **How decisions are made at the various steps of the process, including a description of the government authorities involved;**
- **The appeal process and associated timelines;**
- **Other important elements identified by the public, proponents and other stakeholders in the process.**

2.5 Section 17 of the Act should be amended or replaced with a section that sets out the materials that are required to be included in public registry files. Such requirements should include, but are not limited to:

- **Index of all materials contained in each file, including material that may not yet be available; and**
- **Additional regulatory project requirements such as permits and licences issued under other Acts.**

2.6 The Act should be amended to include a mandatory requirement that decision-makers consider the input of the public at all decision-making stages of the process. Such decisions include:

- **Determining the level of assessment/class of development**
- **The need for a public hearing**
- **Scope of environmental assessment**

- **Final licensing decision**

2.7 The Act should be amended to allow proponents and members of the public to acquire reasons for the following decisions:
  - **Class of development/level of assessment**
  - **Scope of environmental assessment**
  - **CEC terms of reference**
  - **Final licensing decision**
  - **Appeals**

3. Triggering an Environmental Assessment

Before a proponent begins the environmental assessment process, it is necessary to determine whether their proposed project requires an environmental assessment. This is sometimes called the "triggering" part of an environmental assessment process, which generally involves the consideration of legislative criteria that determine whether an environmental assessment is required. The term "screening" is also used in other jurisdictions to identify proposals that must undergo an environmental assessment and to determine the level of assessment required. In Manitoba, *The Environment Act* and the *Classes of Development Regulations* prescribe the framework for triggering the environmental assessment of developments.[418] Any proposed developments that fall within these legislative criteria are subject to an environmental assessment under the Act. The Minister has the authority to make the final determination as to whether a proposed project is a "development" if there is any disagreement.

In Manitoba, the triggering part of the process is related to the determination of a project's level of assessment, as well as the scoping of an environmental assessment, if required by the Minister. Both aspects of the process will be discussed later in this Chapter.

Why are the Triggering Mechanisms Important?

Triggering determines which proposed development projects require an environmental assessment. The triggering process also facilitates consideration of matters such as the timing and scope of the environmental assessment. Such criteria can result in the inclusion of both public and private projects, and can ensure that environmental assessment frameworks consider the effects arising at different stages of a project's development. Setting out clear and understandable criteria that determine whether a project triggers an environmental assessment is important in order for proponents to make economic and planning decisions and also helps with the public's understanding of the process as a whole. Therefore the clarity, flexibility and comprehensive nature of the legislative criteria play a direct role in capturing all projects with the potential to cause adverse environmental effects.

Triggering in Other Canadian Jurisdictions:
Canadian environmental assessment statutes generally use one or a combination of the following methods for triggering the environmental assessment process: an inclusion list; an exclusion list; discretion to determine which projects require an environmental assessment; and a descriptive list of conditions that determine whether an environmental assessment must occur. For example, Alberta's *Environmental Assessment (Mandatory and Exempted Activities) Regulation* sets out activities that require or are exempt from an environmental assessment under the *Environmental Protection and Enhancement Act*.

Most Canadian jurisdictions rely on an inclusion list to trigger the environmental assessment process. Such lists can describe pre-established classes (or categories) of reviewable developments, specific developments that require assessment[419], or set out pre-established criteria for developments that require an environmental assessment[420]. Some jurisdictions also require that an alteration, modification or expansion to a development is subject to the environmental assessment process. In Manitoba, an inclusion list is used as the triggering mechanism. This list, which is set out by the *Classes of Development Regulations* describes three classes of projects, with each class being differentiated by their perceived effect on the environment.[421]

Provision is also made in some jurisdictions to give decision-makers the discretion to determine if developments not captured by the legislative criteria require an environmental assessment.[422] Some jurisdictions provide information on projects or developments that are exempt from environmental assessment or are covered by other existing legislation, standards or guidelines.[423] The main difference among most Canadian provincial jurisdictions lies in the inclusiveness of the list of items that are subject to environmental assessment and the ability of regulators to update these lists as new projects, technologies, processes, etc. are developed.

***The Environment Act:* Recommendations**
As discussed, Manitoba uses an inclusion list as a triggering mechanism. There are advantages of an inclusion list, such as simplicity and clarity. However, there was a wide range of criticism identified by participants with respect to triggering. One such criticism is the lack of flexibility that exists in Manitoba's current process. While the *Classes of Development Regulations* capture the majority of proposed developments in Manitoba, there is an increasing range of projects that would be exempt from an environmental assessment.[424] The fact that the Manitoba courts interpreted the triggering criteria narrowly in *Campbell Soup Co. v Manitoba*[425] has also contributed to this problem.

In *Campbell Soup*, the Manitoba Court of Queen's Bench was called on to interpret the triggering provisions in the Act. The court found that a mushroom farm is not consistent with a food processing plant and is therefore not contemplated in the *Classes of Development Regulation*. The court also considered section 16 of the Act, which allows the Minister to determine whether an activity is a development. The court rejected the argument that section 16 permits the Minister to require an environmental assessment of an activity not contemplated in the regulation. Thus, despite the parties' agreement that the mushroom farm had the potential for significant adverse environmental effects, it was not subject to an environmental assessment process.

Due to the court's interpretation of the Act and regulations in *Campbell Soup*, and the fact that there are currently gaps created by Manitoba's triggering criteria, some participants identified a need to expand the criteria contained in the regulations to ensure a wider range of projects are captured. A legislative mechanism that requires regular review of the inclusion list criteria has also been suggested as a way to minimize potential gaps. Participants also suggested that the Minister should be given discretionary power to order the environmental assessment of a development not contemplated in the *Classes of Development Regulation*. This combination of an inclusion list and Ministerial discretion already exists in several Canadian jurisdictions[426] and was supported by COSDI.

The addition of more flexibility to Manitoba's environmental assessment process is especially important to ensure that where the potential environmental effects of a proposal are unclear or uncertain, or where proposals fall near the thresholds established for listed projects, they can still be captured by the process. The addition of decision-making criteria to indicate how the Minister will consider whether or not to use such discretionary power would be helpful to ensure that Manitoba's process remains transparent to the public and that proponents have a measure of process certainty.

Recommendations:

3.1 Section 16 of The Environment Act should be amended to expand the Minister's discretionary power to include the ability to decide on the classification of a development or to require an environmental assessment for a particular project that is not contemplated in the existing list of developments. This expansion of discretionary power should be accompanied by decision-making criteria in the same or following section of the Act.

3.2 The criteria included in the *Classes of Development Regulations* should be expanded to include consideration of a wider range of requirements that includes, but is not limited to:

- **Proposed location of the development;**
- **Environmental sensitivity of the proposed location;**
- **Uniqueness of the proposed development;**
- **Potential environmental effects; and**
- **Existence of standard or tested mitigation measures.**

4. Environment Act Proposals

As discussed previously, one of the first steps in any environmental assessment process involves the submission of a description of the proposed project.[427] This description, frequently called a project description or proposal, sets out the basic concept of the proposed project which often involves a discussion of the purpose of and need for the project and a description of the proponent's plans for meeting this need.[428] The proponent may also be required to discuss alternative means for achieving the project's goals at this point in the process.[429] Ideally, a project description is submitted before an environmental assessment is undertaken and a proponent proceeds with the final design of the project.

In Manitoba, the description of a proposed development is called an Environment Act Proposal (EAP). The level of information provided in an EAP generally corresponds to the type and size of development being proposed but it can also be related to other factors including the proposed development's location, degree of risk and uniqueness of the development. It is important that a project description, like an EAP, is comprehensive and compatible with other assessment and licensing requirements in order to facilitate an effective environmental assessment and to ensure that all required information is made available to the regulators, reviewers and the public at the beginning of the assessment and licensing process.

Why is an Early Description of a Project Needed?

In Manitoba, an EAP provides information to the EAB which helps reviewers determine whether an environmental assessment is required for a proposed project and if so, what level of assessment is appropriate. The EAP, once added to the public registry, also provides information about the proposed development to the public and other interested or potentially affected parties. In some jurisdictions, like Nova Scotia, the early submission of a development description also helps identify the concerns of the public and Aboriginal people about the potential effects of the proposed development and the actions to be taken by the proponent to address such concerns.[430] Early identification of such concerns can assist the government with determining the need for a public hearing and help identify the issues to be addressed during the section 35 consultation process.

By submitting a description of a proposed development before the final designs are completed and before an environmental assessment is undertaken, a proponent can give the government, public and potentially affected individuals the opportunity to provide input and contribute to the development's design and assessment. While some proponents argue that this may cause delays in the regulatory process and increase overall project costs, this type of early notification can actually reduce the likelihood of more significant delays later in the process, such as having to undertake further assessment of the project's potential effects if the scope of the submitted assessment material is not deemed extensive enough. Early notification also tends to improve public support of the proposed project when an opportunity for meaningful participation is created in relation to the design and assessment of a proposed project.

Project Descriptions in Canadian Jurisdictions

As with most aspects of environmental assessment and licensing, the terminology used in this stage of the process to describe the project description, such as "proposal", "application" and "registration", is different across Canada.[431] There are also a variety of means used in Canadian jurisdictions for setting out the requirements for project descriptions/proposals. In many cases, a combination of mandatory legislative requirements, corresponding regulations and guidance documents is used.[432] In Manitoba, the requirements for an EAP are outlined in *The Licensing Procedures Regulation*.[433] Conservation and Water stewardship also provides guidance for producing an EAP through the *Environment Act Proposal Report Guideline* which applies to all EAPs under the Act.[434] The Department has also recently created separate and supplementary EAP guidelines for certain types of developments.[435]

Since the goal of project descriptions is usually to assist the government with determining whether an environmental assessment is required and to help with the scoping of the environmental assessment, in most jurisdictions such documents are required before the final design of a project is completed and before the assessment of potential environmental effects begins.[436]

Across Canada, there is a range of information that is required to be included in the project descriptions. In Manitoba, the requirements for an EAP are outlined in *The Licensing Procedures Regulation*.[437] Required information includes:

- location of the proposed development[438];
- information about the proponent and owner of the land and natural resource rights[439];
- land use and designation for the proposed site and surrounding area[440];
- proposed operation and construction specifications for the development[441];
- all previous studies related to the project and prior authorization received from other government agencies[442];
- potential effects of the development on the environment[443];
- proposed environmental management practices[444];
- other information requested by the Director[445].

While this is a fairly standard type of information, some jurisdictions require a more extensive range of topics in their project descriptions. For example, "a list of the licences, certificates, permits, approvals and other forms of authorization that will be required for the proposed undertaking"[446] or "information on the effects on Aboriginal peoples of any changes to the environment that may be caused as a result of carrying out the project, including effects on health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes or on any structure, site or thing that is of historical, archaeological, paleontological or architectural significance"[447]. Other data that would be useful as part of a project description include information about raw materials, construction materials, vehicles, and equipment and machinery, as well as products to be manufactured or processed during the course of the project operation and waste materials.

Once a project description has been submitted to the appropriate government department, it is usually reviewed to ensure compliance with the legislative requirements and is provided to the public for review. In Manitoba, the technical review and assessment of development proposals is the responsibility of the Municipal and Industrial Section and the Land Use and Energy Section of the EAB.[448] The TAC also assists the Department with such review.[449] Once the

Director/Minister receives the EAP from a proponent, it is published to the public registry and the public is given an opportunity to provide the Department with input on the Proposal. In many cases, project proposals are used by government to assist with the triggering and scoping stages that will be discussed later in this Chapter.

The Environment Act: Recommendations

The production of an EAP is the best documented step in Manitoba's environmental assessment and licensing process. As discussed previously, the requirements for an EAP are set out in the *Licensing Procedures Regulation* and the Department has produced a general guidance document, along with several specified documents for commonly licensed developments. While this means that the EAPs that are produced in Manitoba are fairly comprehensive for a project description, the fact that many EAPs also function as an environmental assessment report is problematic and as many participants identified, there is a need to distinguish, in the Act, the difference between an EAP that serves as a project description and an environmental assessment report.

As discussed above, a project description like an EAP should function as a means of providing the department and the public with early notification and basic information about the proposed development. Such a document should be thoroughly reviewed by department staff and the public and used to assist with framing the scope of the environmental assessment.

The current practice of skipping the scoping stage for most projects by submitting a completed EAP/assessment report does not allow for input from the public and other interested parties to assist with identifying the issues that should be addressed by the environmental assessment. While this lack of public participation is problematic, the fact that some proponents are required to produce three separate documents (an EAP, scoping document and EAR), while others are granted a licence after only submitting one (an EAP), has also created a lack of process certainty for proponents. This lack of certainty also affects the transparency of Manitoba's process, since the public can never be sure when they might have the opportunity to provide input that can be applied to the scoping and assessment process.

As many participants suggested, the EAP should not take the place of an environmental assessment report. Separating the EAP from the environmental assessment report will help improve process certainty and transparency, and will also ensure that the environmental assessment reports required under the Act are sufficiently comprehensive since the nature and level of detail of information currently required for an EAP is not adequate for the environmental assessment of proposed projects.

Participants also identified a need to expand the information that is currently required for EAPs. It was suggested that the information required by the *Licensing Procedures Regulation* and the *Information Bulletin* is not adequate for a thorough description of all proposed projects. For example, information on the life-cycle of the project, project components and activities, construction materials, process inputs and outputs, wastes and disposal practices, and other matters is generally but not specifically required. By including more specific requirements for an EAP, process certainty will be improved as will transparency. This would be helpful for proponents, the public, and the Department since the consistency of EAPs will be improved and more detailed information will be available to assist with later stages of the assessment and licensing process.[450]

Participants also pointed out that the EAP requirements in Manitoba are not consistent with the federal requirements for project descriptions under *CEAA, 2012*.[451] By ensuring that EAP's include the same level of information as required by the federal processes, it will make things much easier for the purposes of cooperative environmental assessments, joint review panels and substitution reviews.[452]

Participants also identified the fact that there are no specific requirements for the proponent to engage the public about proposed developments and report on the results of such engagement activities. This is particularly important if there is no opportunity for the public to provide input on the scope of the environmental assessment before it is completed.

Sliding Scale

The Act and the regulations currently contain a standard set EAP requirements for the three classes of development which has been identified as problematic since EAP requirements should be flexible enough to ensure that the varying levels of complexity that exist for the different classes of development are adequately captured for all projects. In order to ensure that the level of assessment is proportional to the size and characteristics of the proposed development, the Commission recommends that the mandatory EAP requirements included in the Act reflect a sliding scale with a basic level of information for Class 1 developments, an enhanced level of information for Class 2 developments and a comprehensive level of information for Class 3 developments.

Recommendations

4.1 The mandatory requirements for an EAP should reflect a "sliding scale" with a basic level of information for Class 1 developments, an enhanced level of information for Class 2 developments and a comprehensive level of information for Class 3 developments.

4.2 Section 1(2) of *The Environment Act* should be revised to include the term "proposal" or "development description" to help identify the difference between an EAP and an environmental assessment report. Such a definition should acknowledge that this type of document should be completed and submitted before

the design of the proposed development is finalized and an environmental assessment is undertaken.

4.3 **Section 1.1 of the *Licensing Procedures Regulation* should be amended to require that an EAP include an expanded list of requirements such as, but not limited to:**

- **a list of the licences, certificates, permits, approvals and other forms of authorization that will be required for the proposed undertaking;**
- **sustainability;**
- **information about the development's potential effects on Aboriginal communities; and**
- **a list of the concerns received from the public and Aboriginal communities about the potential effects of the development and the way these concerns will be addressed by the proponent.**

4.4 **The *Information Bulletin – Preparing an Environment Act Proposal* should be amended or replaced with a guidance document that comprehensively describes the form and nature of the information required for an EAP or a guidance document from another Canadian jurisdiction that can be adopted under s. 43(2) of *The Environment Act.***

5. Review of an Environment Act Proposal

Once a proponent has submitted an EAP to the EAB, there are a number of different actions that can take place according to the Act. These actions are determined through the "screening" stage of Manitoba's environmental assessment and licensing process. This step involves a review of the EAP for completeness and helps with the determination of which level of assessment will be required for the proposed development.[453]

Once received by the EAB, an EAP is distributed in electronic format to the public registry and hard copies are placed in various other locations. The EAB undertakes a technical review of the EAP with the assistance of the TAC.[454] It is at this stage in the process that it is determined whether the review of the development will involve a public hearing or if the proponent will be required to submit further information, which is described in the next section of this Chapter.

In Manitoba, the legislative framework allows for different levels of assessment depending on the development's classification as Class 1, 2 or 3 under the *Classes of Development Regulation*. The determination of the level of assessment is generally made based on a development's particular characteristics (i.e., type and size), the potential for significant adverse environmental effects, and public concern.

There are different timelines associated with the screening phase of the process, depending on the Class of Development assigned to the development. Section 3(1) of the *Licensing Procedures Regulation* provides that, for Classes 1 and 2, the Director must distribute an EAP to the public and to affected government departments within 30 days of receipt of the proposal.

The Director is required to determine the form of assessment for Classes 1 and 2 developments within 60 days of receiving a proposal. The Director must direct a public hearing within 21 days after the receipt of objections with regard to Classes 1 and 2 proposals. It is not clear whether this refers to a period of 21 days after the receipt of a first objection, or at the close of the objection period.

For Class 3 developments, the Minister must distribute an EAP to the public and to affected government departments within 45 days of receipt. The Minister must decide on the type of assessment and notify the proponent within 120 days of receipt of the proposal, and direct a public hearing within 60 days of receiving an objection.

Why is a Screening Step Needed?

Recent environmental assessment literature describes the need to apply different levels and types of assessments to different undertakings.[455] The rigour of the process should increase with the level of environmental risk posed by the proposed undertaking. Therefore the screening step is important not just for ensuring that the environmental assessment process is comprehensive and properly addresses the full range of potential effects of a development, but it also gives decision-makers an opportunity to adjust the level or rigor of assessment if necessary.[456]

Environmental assessment processes apply to a wide range of projects with many assessments being routine and the environmental effects minimal or well known. A screening step enables such projects to be quickly reviewed and approved, which reduces costs for proponents and ensures government can focus their efforts on projects that have a higher risk of adverse environmental effects. This step also ensures that contentious or high risk developments receive the level of scrutiny and assessment they require.[457]

Without a screening step, there would be the potential for a large number of developments to undergo assessment unnecessarily and/or for developments with potential for adverse effects to avoid assessment. A screening mechanism allows the environmental assessment and licensing system to focus on developments with potentially adverse environmental effects or developments for which the full range of potential effects is not known.[458]

Screening in Canadian Jurisdictions

There are a variety methods used in Canada to determine the level of assessment that is assigned to a particular development. Most jurisdictions have adopted a hybrid approach to screening that involves lists, thresholds and discretionary power.[459] In Manitoba, as in some other Canadian provincial jurisdictions, the assessment process is guided by the project list that also triggers the environmental assessment process.[460] *The Environment Act* provides for variations in the assessment of Class 1, Class 2 and Class 3 developments, as discussed in greater detail in the next section of this Chapter. These variations are largely dependent on discretionary powers assigned to the Director and Minister.

The Environment Act: Recommendations

Based on the wording of the Act, the mandatory requirements for the different assessment paths appear to be essentially the same for all Classes of Development. The only potential difference is whether a public hearing will be held by the CEC, who the decision maker will be (Director or Minister), and the timelines associated with the screening stage.

One issue that was identified by participants and also by the Government of Manitoba in their *Environment Act Consultation* document, is the fact that the Act is currently silent on the involvement of the Technical Advisory Committee in the review of EAPs.[461] This issue was also previously identified by COSDI.[462] The Commission supports the suggestion of COSDI and the Government of Manitoba to formalize the role and duties of the TAC in the Act.[463]

TAC members are "are experts in a wide range of fields" and assist the department both with the screening step and also help inform the final licensing decision.[464] As identified by participants, it is currently not clear what kind of "experts" are part of the TAC and what criteria they consider when assisting the government with review of the EAP and other documentation that is submitted as part of the environmental assessment and licensing process. To assist with process certainty and transparency, further information about the TAC should be included in the Act.

The timelines set out in the regulation also raise some potential problems. For Class 1 and 2 developments, for example, the Director must publish a summary of the proposal and invite comments no more than 30 days after receiving the proposal. The Director must also make a decision about the type of assessment required no more than 60 days after receiving the proposal. In reviewing the public registry, it appears that a typical consultation period extends for a period of approximately two months. The regulatory deadlines may often therefore require the Director to make a decision about the type of assessment before the close of the public consultation period. In order to ensure that the input of the public is meaningfully utilized and is taken into consideration when the level of assessment is determined, these timelines should be formalized in the Act. A mandatory timeline for public participation would also assist with improving process certainty.

Recommendations:

5.1 **The Act should be amended to include at the very least, a description of the legal origin of the Technical Advisory Committee, the committee's members, and the role and duties of the Committee.**

5.2 **Sections 10(4), 11(8), and 12(4) of Act, or sections 3 to 7 of the *Licensing Procedures Regulation* should be amended to include mandatory timelines for public participation that allows the input of the public to be considered by the department before the level of assessment is determined.**

6. Requirements for Further Information

Once the EAP has been reviewed, the proponent may be required to submit further information about the proposed project, depending on the level of assessment that is assigned to the proposed development. While there are no mandatory information requirements beyond an EAP, further information is usually requested by the Department for most developments. As discussed in the previous Chapter, there are two methods that are used by the Department to obtain such information:

- Providing the proponent with a formal request for information[465]; or
- Requiring further studies and information about environmental protection and management plans or a formal environmental assessment and an assessment report.[466]

For the majority of developments in Manitoba, especially those considered Class 1, the final licensing decision is made on the basis of the information provided by the EAP. In this situation, the scope of the environmental assessment activities undertaken in preparation of the EAP is determined by the proponent without public input. If, however, the Director/Minister determines that the EAP does not provide sufficient information about the potential effects of the proposed development, further information can be requested from the proponent.

For more complex or controversial or Class 2 or 3 developments, the Director or Minister may require a separate detailed environmental assessment report, often termed an EIS.[467] The Act also authorizes the Minister or Director to issue guidelines and instructions for this EIS, often labelled as a "scoping document"[468]. In practice, proponents sometimes submit their own guidelines which may be made available to the public for comment and are subject to review and modification by the EAB.[469] Regardless of who prepared the draft scoping document, it is generally provided to the public at the same time that the EAP is distributed to the public registry. An advertisement is made by the Department at this time to announce the distribution of the two documents, which also sets out the amount of time the public has to submit comments about both publications. Typically, scoping documents are only issued for Class 2 or 3 developments that are likely to be referred to the Clean Environment Commission for a public hearing.[470]

There are a number of options available to the Department to gather further information from the proponent after the EAP has been submitted that range from an informal email request[471] to a requirement for a formal environmental assessment report. Even though a small number of developments in Manitoba are required to prepare an environmental assessment report, these projects (Class 3 and some Class 2) tend to be the most contentious, have a high risk of significant adverse environmental effects, and/or a full range of potential environmental effects are not known. Therefore, as identified by a range of participants, it is important that the requirements for this type of further information are clearly set out in the Act, and involve mandatory criteria.

This section focuses on the process of undertaking further environmental assessment and producing an environmental assessment report. The process usually involves three steps:

- Scoping;
- Assessing the environmental effects; and
- Environmental assessment reporting.

A) Scoping

Scoping under *The Environment Act* is the process of identifying the major issues and environmental effects associated with a proposed development and determining procedural and informational requirements. It is at this stage that the issues and effects to be addressed in the environmental assessment should be determined. Since the final licensing decision in Manitoba is often made based on the information provided in the EAP, a formal scoping stage is by-passed for the majority of proposed developments. Only proposals that are required to provide further information in the form of an environmental assessment report tend to have a corresponding scoping document.

There are a range of factors that affect the scope of an environmental assessment. Such factors include: nature of the development, purpose of the environmental assessment regime, statutory definitions and criteria, and public concern. Existing baseline data helps to frame the scope of the environmental assessment and, at this stage, the need for additional baseline information can be determined.[472] Decisions about public participation, methods of predicting and assessing environmental effects, and additional consideration of alternatives usually begin with scoping.[473]

Why is Scoping Important?

A scoping stage was not originally included in the world's first environmental assessment process under NEPA, but was added later in response to the "encyclopaedic nature" of many EIS.[474] Due to the large volume of material that is involved in the environmental assessment of large developments, scoping can play an extremely important role in ensuring that government and proponent resources are not wasted on assessing and reviewing aspects of the proposed development that do not require further consideration. Scoping helps to ensure that the environmental issues and components of the environment that are important to the various stakeholders in the process are addressed by the assessment. This reduces the likelihood of delays later in the process if further information is required.[475]

Scoping helps identify the most important environmental, social and economic issues associated with a proposed development, establishes the approach to assessment, and highlights missing information. Scoping also establishes boundaries of the environmental assessment: both temporal and spatial. During this stage assessment areas are defined for the effects assessment and time-frames are established for project assessment. Many observers consider scoping the most important aspect of environmental assessment, in terms of both substance and procedure.[476] This is in part due to the fact that environmental assessment undertaken at this stage at the process may be conducted under considerable time and resource limitations.[477]

Scoping can also help to create an assessment process that satisfies all of the stakeholders involved in the environmental assessment and licensing process, and is especially important for the assessment of controversial projects that involve a diverse range of participants.[478] For this reason, public participation is extremely important for the scoping stage of the process since such input ensures the issues important to the public are addressed, helps educate the public and decision makers, and reduces the likelihood of conflicts and delays during later stages of the process.[479]

Scoping in Canadian Jurisdictions:
Best practice models support early, open and interactive scoping procedures.[480] However, there is a variety of scoping procedures used in environmental assessment legislation across Canada and in some cases, like Manitoba, a formal scoping stage/document is not necessarily required for all proposed developments. There is also different terminology used in Canadian legislation to describe this stage and the final document that is produced. For example, most Canadian jurisdictions require the production of "terms of reference" by either the proponent or decision-maker, while others can require the issuance of "guidelines and instructions for the assessment" or the determination of the "scope of the factors to be taken into account" during an environmental assessment.[481]

There are two main methods used to determine the scope of environmental assessments/assessment reports: legislative criteria that must be considered for all such documents, or preparing guidelines for the assessment process based on the specific characteristics of the proposed development.[482] Most jurisdictions in Canada tend to use a combination of both methods and utilize a prescribed list of criteria to be included in the scope while creating the opportunity for addition criteria to be added based on public input and discretionary powers assigned to decision-makers. Many jurisdictions provide guidance material for the production of scoping documents and some of these jurisdictions have also created standardized terms of reference for commonly assessed projects.

For example, under *CEAA, 2012*, the factors that must be taken into account during the environmental assessment of a "designated project" are set out in section 19(1). The scope of these factors is determined by the "responsible authority" or the Minister.[483] In Alberta, the proponent is responsible for preparing proposed terms of reference for an environmental assessment report which then must be submitted to the Director. The requirements for these terms of reference and final report are specified by the Director.[484] The Government of Alberta has also produced standardized terms of reference for various industry sectors and provides guidance on how to use them.[485] British Columbia is similar to Alberta and uses a combination of discretionary power, legislative criteria and templates to assist with determining the scope of environmental assessment.[486]

Other jurisdictions, like Nova Scotia, have included mandatory decision-making criteria to be considered by government authorities in charge of preparing final scoping documents. Section 19(2) of the Environmental Assessment Regulations require that "the terms of reference… shall be prepared taking into consideration comments from: (a) the public; (b) departments of Government; (c) the Government of Canada and its agencies; (d) municipalities in the vicinity of the undertaking or in which the undertaking is located; (e) any affected Aboriginal people or cultural community; and (f) neighbouring jurisdictions to Nova Scotia in the vicinity of the undertaking."

***The Environment Act*: Recommendations**

As identified by many participants, Manitoba's legal foundation for scoping could be improved. There are currently no mandatory requirements for the production of scoping documents under the Act, no guidance materials that assist with the preparation of such documents, and no decision-making criteria that outline the input that is taken into consideration by decision-makers when determining the scope of an environmental assessment. There is currently little clarity about the respective roles of the regulator, the proponent and the public.

Another issue that was identified by participants and will be discussed in other sections of this Chapter, is the fact that there is no formal scoping stage for the majority of developments that are subject to Manitoba's environmental assessment and licensing process. This is in large part due to the fact that the potential environmental effects of these Class 1 and 2 developments are discussed in the EAP, with no formal scoping stage occurring before the production of this comprehensive EAP. As discussed in Section 5 of this Chapter, the Commission is recommending that EAPs, regardless of the class of development, should be submitted before the completion of the assessment of potential environmental effects. If this recommendation is accepted and the environmental assessment and licensing process is adjusted to require both an EAP and a separate environmental assessment report, it will be appropriate to include a mandatory requirement for the production of a scoping document for all Classes of Development. At the very least, the mandatory production of a scoping document, with mandatory consideration of the input of the various stakeholders, including the public, should be required for any proposed development that will be required to produce an environmental assessment report, even if it determined that such a report is only appropriate for Class 3 and some Class 2 developments. These mandatory requirements will serve to increase process certainty for proponents, improve transparency for all stakeholders involved in the process, and will ensure that Manitoba's *environmental assessment requirements meet* the standards that have been set by other jurisdictions in Canada. The production of standardized scoping documents for commonly assessed developments or classes of development, and guidance materials for proponents is also recommended.

Participants also identified a need for the Clean Environment Commission to have a formal role in the review of scoping documents. During the past few CEC hearings that have occurred recently, there have been problems associated with the fact that the terms of reference set by the Minister for CEC hearings and the scope of the environment assessment required by the same decision-maker were different. While public hearings and the reason why a more narrow scope may be appropriate for such hearings will be discussed in a different section of this Chapter, this issue can also be addressed in relation to the production of scoping documents. If the input of the CEC was formally considered at the scoping stage of the environmental assessment, it is likely that some of the delays that have occurred during the last few hearings when proponents have been required to address issues that were not discussed in enough detail by the environmental assessment report could be avoided.[487]

Sliding Scale

As discussed previously in this Report, there is a need to maintain flexibility within Manitoba's environmental assessment and licensing process to ensure that the varying levels of complexity that exist for the different classes of development are adequately captured for all projects. In order to ensure that the level of assessment is proportional to the size and characteristics of the proposed development, the Commission recommends that any mandatory requirements for environmental assessment included in the Act reflect a sliding scale with a basic level of information for Class 1 developments, an enhanced level of information for Class 2 developments and a comprehensive level of information for Class 3 developments.

Recommendations:

6.1 Section 1(2) of *The Environment Act* should be amended to include a definition for the term "scoping document" or "terms of reference".

6.2 The mandatory requirements for environmental assessment included in *The Environment Act* should reflect a sliding scale with a basic level of assessment and report for Class 1 developments, an enhanced level of assessment and report for Class 2 developments and a comprehensive level of assessment and report for Class 3 developments.

6.3 **Sections 10(6), 11(8), and 12(5) of *The Environment Act* should be amended or repealed and replaced with sections that include a mandatory requirement for:**

- **production of a formal scoping document;**
- **public review period for all formal scoping documents;**
- **review of the scoping document by the TAC; and**
- **review of scoping documents by the CEC.**

6.4 ***The Environment Act* should be amended to include criteria that must be taken into consideration by the government when determining the level of assessment and finalizing scoping documents. Such criteria should include, but are not limited to:**

- **comments from the public;**
- **comments from the TAC, IPB and other affected government departments;**
- **comments from the Government of Canada and its agencies (when applicable);**
- **comments from the municipalities in the vicinity of the undertaking or in which the undertaking is located;**
- **comments from any affected Aboriginal people or cultural community; and**
- **responses from the proponent.**

B. Environmental Assessment and Reporting

Environmental assessment can have several meanings depending upon how the term is used as well as its context. For the purpose of this discussion environmental assessment may mean:

1. A process that a proposed project must undergo during the planning and design stages prior to decision-making, licensing or approval stage;
2. A set of procedures, methods or steps by which the environmental effects of a proposed project are identified and analyzed, mitigation measures are identified, follow-up actions are identified and the significance of residual environmental effects are evaluated; and
3. A report prepared on the environmental assessment carried out on a proposed project that is submitted for approval as part of licensing or approval.

While the term "environmental assessment" has been used to describe the entire process under the Act from the submission of the EAP to the final licensing decision, in this section it is used to describe the technical process of data collection, effect prediction, mitigation and significance evaluation.[488] Despite the fact that an environmental assessment (and any corresponding documents) forms the basis of the information considered when a licensing decision is made under *The Environment Act*, this aspect of the process is given almost no treatment in the Act. There has also been a lack of consistency in relation to EAPs, environmental assessments and environmental assessment reports in the public registry as many listed "environment act proposals" are actually labelled as or contain the information usually associated with an environmental assessment report or environmental impact statement (EIS).[489]

Environmental assessment and environmental assessment reporting are used as planning and decision-making tools and are most effective when a comprehensive and focused level of information about the project, the environment, environmental effects, mitigation measures, follow-up actions, significance of residual environmental effects and other matters related to the proposed development are included. Some Canadian jurisdictions treat environmental assessments and environmental assessment reports separately while others deal with them together. For the purposes of this Chapter, the conduct of an environmental assessment and the production of an environmental assessment report will be considered separately.

Undertaking a comprehensive environmental assessment and producing a well-documented environmental assessment report that adequately addresses all of the components of the environmental assessment can facilitates an effective, efficient and timely review and approval process. However, an assessment and/or assessment report that does not address existing environmental issues, public concerns, and potential environmental effects in a comprehensive manner will likely result in negative public feedback for the project, additional information requirements and public reviews, lengthy assessment periods, missed deadlines and cost overruns. Therefore a comprehensive and transparent environmental assessment and assessment report is important for all participants in an environmental assessment and licensing process. As discussed previously, the basic requirements should be set out in the Act, detailed in a corresponding regulation and further explained in government issued guidance documents.[490] Ideally, the introduction of such changes would be accompanied by public education initiatives, specific guidance documents, practitioner training and professional development.

Identifying and Assessing the Environmental Effects

The conduct of an environmental assessment generally involves identifying the potential environmental effects of a proposed development project, identifying the means by which the proponent plans on preventing and minimizing such effects, and evaluating the significance of residual environmental effects. The practice of environmental assessment integrates the social and natural sciences and relies on an eclectic knowledge base that comes from a wide range of sources. The methods and tools used during an environmental assessment help to provide a structure and means of integrating information about the project on a wide range of subjects in order to predict and evaluate potential environmental effects.[491]

The technical process of environmental assessment generally consists of a number of separate steps that are carried out in a sequential, parallel and overlapping manner. The goal of these steps is to gather comprehensive but focused information about the proposed project and to provide the essential elements to the decision-makers and the public in a form that can be understood by individuals with varying degrees of technical expertise. These steps generally include:

- Scoping to focus the environmental assessment;
- Describing the proposed project;

- Describing the environmental setting;
- Identifying and analyzing environmental effects;
- Identifying mitigation measures for adverse effects;
- Identifying residual environmental effects;
- Identifying follow-up actions; and
- Evaluating the significance of residual environmental effects.

The results of an environmental assessment are often summarized in report form that is usually called an environmental assessment report ("EAR") or an EIS. Other activities associated with environmental assessment include issues identification, valued component identification, analysis of alternatives, cumulative effects assessment and public engagement.[492] It is important to note that while some activities are considered once and early in the environmental assessment process, public engagement occurs continuously throughout the process from early scoping through to post-approval follow-up.

Environmental assessment can be viewed by some as a time-consuming, costly, and complicated matter. There are often many different individuals who work on the conduct of an environmental assessment and preparing corresponding EAR.[493] However, there is usually very little, if any, involvement of legal counsel during this step, which is perhaps why Manitoba's legislation is so silent on the subject. Whatever the reason, it is clear from the feedback received from the Committee, participants and those who met with the Commission in person, that there is a need to expand the legal provisions of *The Environment Act* to provide at least a basic framework for undertaking an environmental assessment and producing an EAR.

As discussed previously, the technical aspects of environmental assessment are generally beyond the scope of this project. However, since the technical aspects of the environmental assessment and licensing process are so important, the government is encouraged to work with the technical experts that undertake environmental assessments for proponents and develop guidance materials to assist with critical aspects of environmental assessment, such as the determination of significance and cumulative effects assessment. Both of these activities will be discussed in a later section of this Chapter.

Environmental Assessment Reporting

An environmental assessment report, sometimes referred to as an EIS, is essentially a summary of all of the information that was collected and evaluated during technical process of environmental assessment, as described above. Since the environmental assessment report forms the basis of the information used by decision-makers when deciding to issue an Environment Act Licence, this step in the process is especially significant and is often considered "the most important activity in EIA [environmental impact assessment]"[494].

Manitoba's Act does not currently contain any mandatory requirements for the production of an environmental assessment report. However, when such a report is required by the Director or Minister, it must "include such studies, research, data gathering and analysis or monitoring, alternatives to the proposed development processes and locations, and the details of proposed environmental management practices to deal with the issues"[495].

Preparing an assessment report generally follows the technical aspects of assessment, although in actual practice, this reporting stage tends to occur during the assessment as well. The required content of an environmental assessment report is usually determined by the government department that administers the environmental assessment process. Pre-consultation with the proponent or the production of a scoping document generally sets these criteria, or it set out in the environmental assessment framework.[496] Once the report is completed and submitted to the government, it is usually subject to technical and public review and then used by the decision-maker to determine whether the proposed development should be approved (licensed) or not.

Environmental Assessment Reporting in Canadian Jurisdictions

All Canadian jurisdictions have some form of legislation addressing the conduct of and reporting on environmental assessment. Although there is a considerable amount of literature that discusses the actual technical practice of collecting and presenting the data and information involved in environmental assessment, there is wide variance in the requirements that are set out in Canadian legislation and corresponding guidance documents.[497] Most jurisdictions, including Manitoba, provide very little guidance for the conduct of environmental assessment. What is more common, although not consistently utilized across Canada, are legislative criteria that set a minimum standard for the content of EAR and guidance materials that indicate the procedures which must be followed for the submission of the report (e.g. format, number of copies, etc.).

There is inconsistency in the terminology used in Canadian jurisdictions to describe these assessment and reporting requirements, and as a result, there is a wide range of environmental assessment terms with similar meanings or definitions used.[498] Similarly, the specific considerations to be included during an environmental assessment and described in an EAR cover a range of subjects which includes but is not limited to:

- Scope of the project and assessment
- Need for the development[499]
- Consideration of alternatives[500]
- Adequacy of existing environmental information
- Public opinions and use of such information[501]
- Aboriginal Traditional Knowledge[502]
- Environmental effects
- Residual environmental effects
- Cumulative environmental effects[503]

- Significance of residual environmental effects
- Sustainability of the development[504]

Most legislation also provides the decision-maker with discretionary authority to add other informational requirements to the environmental assessment and assessment report.[505]

There is a range of methods used by Canadian government authorities to identify the requirements for environmental assessment and/or reporting. In some jurisdictions these requirements are contained in environmental assessment legislation, while in other jurisdictions the requirements are identified by terms of reference, guidelines, codes of practice, templates or other means. For example, under *CEAA, 2012*, environmental assessment of a designated project must take into account the factors listed in the legislation.[506] Alberta's *Environmental Protection and Enhancement Act* contains requirements for the preparation of an environmental assessment report.[507]

In British Columbia, a series of guidance documents is used to provide the majority of information about environmental assessment requirements.[508] The government of Alberta provides further explanation of the environmental assessment process in a government prepared guideline and provides separate guidance for the use of standardized terms of reference and preparing, submitting and reviewing an environmental assessment report.[509] Prince Edward Island also relies on guidelines to provide the majority of the requirements for environmental assessment.[510]

In Nova Scotia, *Environmental Assessment Regulations* provides the bulk of the informational requirements for an environmental assessment report[511] and guidance is provided in *A Proponent's Guide to Environmental Assessment* and other guidance materials.[512] Ontario's' *Environmental Assessment Act* sets out the basic requirements for an environmental assessment and two codes of practice outline the legislative requirements for conducting environmental assessments and preparing environmental assessment reports.[513]

These examples make it clear that there is a range of different mechanisms to provide proponents and the public with information about the conduct of environmental assessment and the content of environmental assessment reports. While the focus of this section is on Canadian examples, it must be noted that there is an even wider variety of methodologies and successful environmental assessment processes at the international level, such as in Australia and the United States, that are worth considering when looking at examples of how other jurisdictions treat environmental assessment and reporting.

The Environment Act: Recommendations

The Environment Act defines assessment as: "an evaluation of a proposal to ensure that appropriate environmental management practices are incorporated into all components of the life-cycle of a development."[514] The Act does not include a formal requirement for the production of an environmental assessment report that is separate from an EAP. Instead, the Act relies on a discretionary decision made by the Director or Minister to determine if a separate report is required.[515]

The legal and policy requirements for environmental assessment are arguably the weakest part of Manitoba's environmental assessment and licensing scheme. This is largely due to the fact that there are no mandatory requirements for undertaking an environmental assessment or completing an environmental assessment report.[516] As well, the fact that for most projects the EAP functions as both the environmental assessment and the environmental assessment report, and therefore bypasses the scoping stage of the process has contributed to widespread confusion on the part of proponents, consultants and the public about the level of effort required for an environmental assessment, and the format and contents of environmental assessment documents.

The fact that the EAP often plays the same role as an environmental assessment report for proposed developments has created a lack of consistency and transparency in Manitoba's environmental assessment and licensing process. The majority of participants that provided feedback to the Commission identified the need to create a clear and separate distinction between an EAP and an environmental assessment report. As discussed earlier in this Chapter, it is important that each step in the environmental assessment and licensing process is clearly identified and the requirements for each step are formalized in the legislation and/or a binding regulation in order to provide certainty and transparency for the participants in the process.[517]

By clearly stating the requirements of each of these undertakings in the legislation, and providing further direction through government issued guidance documents, it will be much easier for proponents, the public and government to understand what is expected at each step in the process and to ensure that the documents produced are consistent and as useful as possible for the public and government bodies responsible for review and enforcement. This could include the production of project or industry-based guidance materials for commonly licensed developments, standardized templates or even the adoption of guidance documents and/or standards from other Canadian jurisdictions under s. 41(3) of *The Environment Act*.[518]

Participants also identified a need to better identify the expectations associated with environmental assessments produced for the different classes of developments. The fact that there are no mandatory requirements in the Act for the conduct of an environmental assessment or producing an assessment report has also led to an inconsistency in the factors that are considered by decision-makers at the licensing stage of the process. As discussed above, there is a wide range of mandatory considerations that are included in the legislation of other Canadian jurisdictions and the government authority is usually given discretionary power to add more if deemed necessary. Participants identified a range of requirements that should be made mandatory for environmental assessments/assessment reports in Manitoba such as Aboriginal Traditional Knowledge, cumulative effects, consideration of alternatives, follow-up programs, sustainability and regional environmental studies. All of these suggestions exist in the legislation of other Canadian jurisdictions, such as the comprehensive list contained in *CEAA, 2012*.[519] This indicates a need for Manitoba to update *The Environment Act* and its regulations and produce descriptive guidelines to ensure that environmental assessments are as comprehensive as possible, consistent with best practices and compatible with the process under *CEAA, 2012*.

Since it may not be appropriate to require a consideration of all of these factors for all classes of development, the mandatory requirements for environmental assessments and assessment reports should allow for flexibility. In order to ensure that the level of assessment is proportional to the size and characteristics of the proposed development, the Commission recommends that any mandatory requirements for the production of an environmental assessment report included in the Act reflect a sliding scale with a basic level of information for Class 1 developments, an enhanced level of information for Class 2 developments and a comprehensive level of information for Class 3 developments. This may be accomplished by creating a progressively more detailed list of requirements, a standardized form or template with different sections for Class 1, 2 and 3 developments, or another means of specifying the level of assessment required for those developments.

The legislative criteria from other jurisdictions described above have been used to address both:

- issues that must be considered during the conduct of an environmental assessment; and/or
- issues to be addressed in the final environmental assessment report.

In actual practice, the result of both types of legislative criteria tend to have the same result – a consideration of the identified issues during the technical environmental assessment process and a description of these issues in the EAR. Since the Commission has already recommended that a mandatory scoping document be produced for all required environmental assessments, which would create a mandatory set of criteria to be addressed during the technical process of environmental assessment, the most appropriate means of ensuring that legislative criteria is considered during the scoping, environmental assessment, and reporting stages of this part of Manitoba's process is to create mandatory requirements in the Act for the production of an EAR. In this way, in order to ensure that the EAR adequately addresses these requirements at the reporting stage of the process, the department will have to include such criteria in the scope of the environmental assessment and the proponent will have to address these issues during the assessment itself.

Overall, it is clear that there is an immediate need for *The Environment Act* to be amended in order to identify more clearly the requirements for undertaking an environmental assessment and the production of environmental assessment reports. These requirements need to be flexible, reasonable and reflect the risks imposed to the biophysical, social and economic environment by different projects ranging from class 1 to 3 developments. Updating Manitoba's environmental assessment and licensing process to create a clear separation between the submission of environment act proposals and the scoping, environmental assessment and environmental assessment reporting steps of the process will help to improve the compatibility of our legislative scheme with that of other Canadian jurisdictions, like *CEAA, 2012*. Clearly identifying the considerations that must be included in an environmental assessment and an environmental assessment report in the legislation, and providing further guidance through regulatory and guidance documents will improve the consistency and transparency of the assessment process and will ensure that the environmental effects of developments in Manitoba are appropriately assessed and the province's long-term environmental goals are achieved.

Recommendations:

6.5 **The definition for the term "assessment" currently found in section 1(2) of *The Environment Act* should be revised to recognize that an Environmental Act Proposal and an Environmental Assessment Report are two distinct documents. The term "environmental assessment report" should also be added to this section of the Act.**

6.6 **Sections 10(6), 11(9), and 12(5) of *The Environment Act* should be amended or repealed and replaced with sections that include a mandatory requirement for the production and submission of an environmental assessment report that is separate from an EAP.**

6.7 **Sections 10(6), 11(9), and 12(5) of *The Environment Act* should be amended or repealed and replaced with sections of the Act or separate Environmental Assessment Regulations, that set out specific requirements for the conduct of an environmental assessment and/or the production of an environmental assessment report. Mandatory considerations should include, but are not limited to:**

- **Need for the development;**
- **Consideration of alternatives;**
- **Environmental effects;**
- **Mitigation of adverse effects;**
- **Follow-up actions;**
- **Significance of residual environmental effects;**
- **Cumulative effects;**
- **Public information gathered during the course of the assessment and how such information has been utilized;**
- **Aboriginal Traditional Knowledge; and**
- **Sustainability.**

6.8 Guidance should be provided detailing requirements for the conduct of an environmental assessment and the preparation of an environmental assessment report through one or more of the following methods:

- **Government prepared guidance document or information bulletin;**
- **Detailed terms of reference;**
- **Detailed annotated templates; and**
- **Adoption of guidance documents, codes of practice, or standards from other Canadian jurisdictions under s. 41(3) of *The Environment Act.***

6.9 Specific project or industry-based guidance documents for the conduct of environmental assessments and the preparation of environmental assessment reports should be developed.

7. Decision-making under the Act

Many different decisions are made throughout environmental assessment and licensing processes. Some of these decisions are made by the proponent, some are made jointly by the proponent and government authorities, and some are made solely by democratically elected political officials. The most important decision, whether or not to approve a proposed project, is normally made by government officials following consultation and public participation. This final decision is based on the results of the environmental assessment and licensing process, and often includes a consideration of political, economic and social issues.[520] Manitoba's Act is somewhat unique in the sense that the environmental assessment process and the final approval/licensing decision are considered part of the same legislative process. Many other jurisdictions have created a separation between the two processes in which the final licensing or approval authority does not have a considerable amount of involvement in the actual environmental assessment process.

There is a scarcity of literature in the field of environmental assessment decision-making.[521] This is in large part because such decisions, particularly the final licensing or approval decision, can be political in nature. However, some argue that certain elements are critical for transparent and effective decision-making in any context. Such elements include: legislated decision-making criteria, publicly available reasons for the decision, and a public right of appeal against the decision.[522] Appeal provisions will be addressed in the next section of this Chapter. This section and the corresponding recommendations address decision-making at all stages of the environmental assessment and licensing process. When considering the application of these recommendations to Manitoba's Act, emphasis should be placed on the final licensing decision of Manitoba's process.[523]

Decision-making in Canadian Jurisdictions

Like many environmental assessment statutes in Canada, *The Environment Act* is characterized by a large degree of discretion in decision-making. There are very few decision-making criteria provided in the Act, and the Director and Minister make many important decisions without any statutory direction.[524] While some degree of discretion is necessary to allow for flexibility in addressing the large variety of fact situations, locations, and technologies at play in environmental assessment and licensing processes, unfettered exercise of discretion can undermine the certainty, consistency and predictability of the process. It also creates the risk that the system may become politicized, with the authorities being subjected to pressure from various stakeholders and lobbyists, and making decisions accordingly. While Manitoba's Act may not yet sufficiently assess these issues, other jurisdictions in Canada have created legislative criteria to improve the transparency and certainty of their environmental assessment processes.

i) Decision-making Criteria

As discussed, Manitoba's Act prescribes very few factors to be considered when making decisions about the environmental assessment process or the final licensing decision. Section 12.0.2 of the Act contains the only substantive decision-making criteria in the entire legislative framework, and requires the Minister or Director to take into account the amount of greenhouse gases generated by, and the energy efficiency of, the proposed development when considering a proposal.[525] There are other jurisdictions in Canada that do not supply, or do not supply much, in the way of substantive criteria for decision-making in their legislation. In such cases, as in Manitoba, decision-makers likely rely on their own experience and judgment, the purpose of the legislation and published guidelines to aid them in the exercise of discretion.

However, there are Canadian jurisdictions that provide a set of factors that must be taken into account when making decisions. Under this approach, the ultimate decision is still within the discretion of the government authority, but there is clear guidance about what factors are relevant to the decision. For example, under *CEAA, 2012*, section 19 prescribes the factors that must be taken into account in an environmental assessment.[526] In British Columbia the Minister has discretion in making a final decision on a project, but must consider the assessment report and recommendations from the Environmental Assessment Office. The Minister may also consider other matters he or she deems relevant to the public interest.[527] Alberta, Ontario and Nova Scotia all contain similar decision-making criteria in their legislative frameworks.[528]

ii) Reasons for Decision

In Canadian jurisdictions, statutory decision makers may also have a duty to provide reasons for certain decisions in the environmental assessment and licensing process. Arguments in favour of providing written reasons for statutory decisions are: improving the quality of decision-making, increasing fairness and transparency, facilitating rights of review and enhancing consistency. Manitoba's Act requires written reasons in four circumstances:

- when the Director decides not to recommend a public hearing in the face of objections;
- when the Minister decides not to request a public hearing after receiving a recommendation from the Director;
- when the Director or Minister refuses to issue a license; and
- when the Minister declines to follow the recommendations of the Clean Environment Commission in respect of a license.

Other jurisdictions, like Nova Scotia and Saskatchewan, require written reasons for the final approval/licensing decision.[529]

The Environment Act: Recommendations

There are a number of contrasting viewpoints on the amount of discretion that should be given to decision-makers in environmental assessment and licensing processes. Since Manitoba's current process relies so heavily on the discretion of the Director and/or the Minister, for the purposes of improving process certainty and transparency, an appropriate middle ground between unfettered discretion and a rigidly prescribed decision-making process should be sought. This would be consistent with a line of decisions from the Supreme Court of Canada which suggest that even the most apparently unfettered administrative and executive discretion must be exercised within a legal framework. The Court has stated that the exercise of discretion is to be based on a weighing of considerations pertinent to the object and purpose of the statute.[530] Several reform initiatives, including COSDI, have also recognized that flexibility and transparency can, and should co-exist within an environmental assessment system.

With almost no decision-making criteria currently prescribed in the Act and no requirement to provide reasons, there might conceivably be nothing legally wrong with a decision to approve a development proposal, even if that project carries significant risk or the potential for adverse environmental effects. To prevent this type of situation occurring, some limits should be placed on the discretion of decision-makers, especially for the final licensing decision. As discussed by participants, members of Manitoba's public currently view issuance of licences under the Act as inevitable, and some consider decision-makers to be biased in favour of government proponents and Crown corporations. This problem is compounded by a lack of transparency since most decisions are made under the Act without any public justification.

In order to improve the transparency and certainty of Manitoba's environmental assessment and licensing process, participants identified a need for the inclusion of decision-making criteria and legislative mechanisms that allow the public and proponents to obtain written reasons for important decisions, especially the final licensing decision. The fact that the Minister or Director is not required to provide reasons when a licence is approved in the face of objections, or when decisions are made in respect of alterations under section 14 is considered problematic and should be addressed with legislative reforms. Mandatory timelines should also be developed and imposed on requests for and the production of reasons in order to improve process certainty and transparency. A mandatory requirement for the inclusion of any requested reasons for decisions in the public registry should also be added to the Act.

Recommendations:

7.1 ***The Environment Act* should be amended to include decision-making criteria for the following decisions made during the environmental assessment and licensing process:**

- **Determination of whether a proposed project is a development;**
- **Level of assessment assigned to a proposed development;**
- **Scope of any required environmental assessment and environmental assessment reports;**
- **Approval or denial of a licence; and**
- **Appeal dismissal or licence variance issued by the Minister and/or Lieutenant Governor-in-Council.**

7.2 ***The Environment Act* should be amended to include provisions that allow proponents and members of the public to acquire reasons for the following decisions made during the environmental assessment and licensing process:**

- **Determination of whether a proposed project is a development;**
- **Level of assessment assigned to a proposed development;**
- **Scope of any required environmental assessment/environmental assessment reports;**
- **Approval or denial of a licence; and**
- **Appeal dismissal or licence variance issued by the Minister and/or Lieutenant Governor-in-Council.**

7.3 **Section 17 of the Act should be amended to require the inclusion of any requested reasons for decision in public registry files.**

8. Appeals

The appeal mechanisms that are contained in environmental assessment legislation can play an important role in the public's perception of an assessment system. A review mechanism promotes transparency and fairness, and contributes to a system's overall sustainability.[531] There are two principal mechanisms used for reviewing environmental assessment decisions and actions in Canada: judicial review and statutory appeals.

Judicial review is concerned with the procedural legality of the administrative process, and does not typically address a decision's merits. However, this type of review can involve consideration of whether a decision-maker's exercise of discretion was lawful as determined by the legislative framework under which the decision was made. Statutory appeal mechanisms, such as those that exist in Manitoba's Act, involve review of the decisions made throughout the environmental assessment and licensing process, and often focus on the final approval or licensing decision.[532]

Although judicial review of environmental assessment decisions is available in Manitoba, as it is throughout the rest of Canada, possible improvements to the judicial review process are not addressed in this Report. Instead, the availability of statutory appeals from environmental assessment decisions will be discussed.

Appeal Mechanisms in Canadian Jurisdictions

There is a variety of appeal mechanisms used in environmental assessment legislation across Canada. While the legislation in some jurisdictions does not contain appeal provisions, most have some type of appeal opportunity available. In Manitoba, statutory appeal mechanisms exist for decisions made by the Director and Minister. Unlike many jurisdictions, the provincial Cabinet in Manitoba is involved in the appeal process, and considers appeals from the Minister's decisions made under sections 10, 11, 12 or 14(2) of the Act.

Some jurisdictions use government officials, such as the Minister, to make appeal decisions, while others have explored the use of independent tribunals. In Manitoba, the Minister reviews appeals that arise from decisions made by the Director, and the Cabinet reviews appeals that arise from decisions made by the Minister. In other jurisdictions, like Alberta and Ontario, specialized environmental administrative tribunals are authorized to hear appeals from development approval and licensing decisions, with varying degrees of binding decision-making authority.[533] While Manitoba's Act does not include any decision-making criteria that can apply to appeal decisions, other jurisdictions, like Ontario, have included such criteria in their environmental assessment legislation.[534]

An important aspect of any environmental assessment and licensing decision is transparency. In Manitoba, there is currently little access to appeal documents, unless the applicant has specifically indicated that their application is to be included in the public registry file. While the results of appeals to the Lieutenant Governor-in-Council are documented in publicly available Orders in Council, such orders usually do not contain information about the parties who have filed an appeal, issues brought up in the appeal documents, and reasons for the final decision.[535] Information about appeals made to the Minister is not available unless the Minister forwards the appeal document to the Cabinet for approval. Other jurisdictions, like Nova Scotia, require that appeals must be included in the registry.[536]

Another means of improving transparency of the environmental assessment appeal process is a requirement to provide reasons for appeal decisions. In Manitoba, decision-makers are not required to provide reasons for appeal decisions. Other jurisdictions like Alberta and Ontario, have included provisions that require decision-makers to provide written reasons for decisions related to appeals.[537]

The Environment Act: Recommendations:

Manitoba's system for statutory appeals is robust when compared to other jurisdictions that provide no opportunity for appeal. Nevertheless, participants identified a need for improvement in regard to Manitoba's current appeal process. Identified areas of reform include timelines, reasons for decisions, access to information, and the authority responsible for appeal decisions.

One of the main issues identified by participants is the fact that in Manitoba, it is possible for the proponent, decision-maker, and appellate body to be the same party. For instance, as a result of reorganization in the early 2000s, the Department of Conservation and Water Stewardship can act as both proponent and regulator. This situation has created a perception of bias in relation to government decision-making and feelings that it is inevitable that licences will be issued for government developments, or those proposed by Crown corporations. Participants suggested a number of solutions to this problem, such as the creation of an independent review body that is permanent and/or ad hoc. Also suggested was a greater role for the CEC in appeals from Directorial or Ministerial decisions when the CEC has not been requested to hold a public hearing. Participants also suggested a range of other solutions to improve the transparency and certainty of the appeal process, such as the development of decision-making criteria, and a mandatory requirement to include appeal documents in the public registry.

Another common criticism involves section 30 of the Act which provides that the filing of appeal does not act as a stay of appeal.[538] While there is good reason to ensure that the filing of an appeal does not automatically result in a stay of decision, such as the potential use of such provision as a tactic to delay construction of projects and interfered with the licensing process, there is currently no provision in the Act that allows an appellant to apply for a stay when the situation may warrant such an application. As suggested by participants, it may be appropriate to reform the Act to include a provision that allows an appellant to apply for a stay of appeal, pending the outcome of an appeal. This seems particularly appropriate considering the inconsistencies and lack of transparency associated with Manitoba's appeal process.

Other issues discussed in relation to appeals under the Act include the use of mandatory timelines for the submission of appeal documents and appeal decisions and the availability of a stay of decision. While appeals in writing must be filed within 30 days of the issuance of a licence under the Act, there are no mandatory timelines associated with appeal decisions. This has contributed to inconsistencies in the timelines associated with appeals, particularly for Ministerial decisions that must be approved by the Cabinet. It is common for such appeals to take considerably longer than twelve months to be decided, and since licences are rarely stayed until the appeal is disposed of, proponents can make considerable progress in the construction of the development by the time an appeal decision is made.[539] Delays in the appeal process have implications for proponents who require certainty about the licensing terms and conditions, and for members of the public with concerns about the environmental effects of the development as licensed. As suggested by participants, prescribing a reasonable period of time during which appeals must be decided could help address this concern.

Recommendations

8.1 Sections 27 and 28 of *The Environment Act* should be amended to allow for review of licensing decisions by an independent body such as an ad hoc review panel or the Clean Environment Commission. Such review should result in recommendations to be submitted in writing and considered by the appropriate decision-making authority.

8.2 *The Environment Act* should be amended to include legislated timelines for the review of appeal documents, and final appeal decisions.

8.3 *The Environment Act* should be amended to include a provision that allows members of the public to acquire reasons for appeal decisions made by the Minister and the Lieutenant Governor-in-Council.

8.4 Section 17 of the Act should be amended to require the inclusion of appeal documents in public registry files. Such documents should include, but are not limited to:

- **Appeal applications;**
- **Appeal decision; and**
- **Reasons for appeal decisions.**

9. Monitoring, Compliance Follow-up and Enforcement

The final stage of the environmental assessment and licensing process involves monitoring the implementation of a project proposal and its actual environmental effects, ensuring the proponent is complying with the terms and conditions set out in the final licensing document, and enforcing those terms and conditions and/or adjusting mitigation and management plans when proponents are not in compliance or unanticipated environmental effects occur.[540] The development of these post-licensing activities is a relatively recent one in the evolution of environmental legislation and has tended to be a neglected area of environmental assessment.[541] Overall, most jurisdictions have been working towards improving the legal mechanisms and improving the legislative connections between environmental assessment processes and the agencies that actually enforce licence conditions and monitor compliance.

Like the conduct of environmental assessments, as discussed in section 6 of this Chapter, monitoring and compliance follow-up involves a variety of technical scientific activities and environmental management practices.[542] Since these technical aspects of the process involve expertise that is outside the scope of this project, this section will focus on the legal mechanisms that can be used to outline the basic framework for this final stage of the environmental assessment and licensing process. The technical details are more appropriately addressed in guidance materials, regulations, codes of practice, and other means developed with input from the public and those individuals that regularly undertake such processes in Manitoba.

Why is follow-up and enforcement important?

Post-licensing activities such as monitoring, follow-up and enforcement play an important role in environmental assessment and licensing systems. These practices serve a number of important purposes including:

- Ensuring that terms and conditions of project approval are implemented;
- Verifying environmental compliance and performance;
- Coping with unanticipated changes and circumstances;
- Adjusting mitigation and management plans to suit changing circumstances; and
- Learning from and disseminating experience with a view to improving the environmental assessment process, and project planning and development.

When a proposed development is approved, it is usually not possible to impose conditions that will cover every possible situation and address all environmental effects that may arise during project construction and operation, especially those which are unanticipated.[543] There is always a possibility that the construction, operation, and resulting environmental effects will differ from the plans made when the environmental assessment report was prepared. Post-licensing activities like monitoring and auditing help ensure the environmental effects of these unanticipated differences are kept to a minimum, as well as providing other benefits.[544]

Follow-up and Enforcement in Canadian Jurisdictions

Many commentators consider post-licensing provisions to be among the least developed aspects of environmental assessment and licensing regulatory systems in Canada and other countries. Recent audits in Canada and internationally have identified significant shortcomings in the follow-up and enforcement of environmental assessment provisions in the audited jurisdictions. Law reform and review initiatives commonly identify the need to provide for concrete mechanisms and defined levels of responsibility for follow-up and enforcement in environmental assessment legislation.[545] Although the specific technical details of the post-licensing activities normally involved in environmental assessment and licensing processes will not be discussed, this section will generally address monitoring and auditing practices, enforcement mechanisms and program evaluations.

i) Monitoring

Monitoring is the process of measuring and recording information about environmental effects identified in the environmental assessment, testing the effectiveness of mitigation measures, and identifying potentially detrimental changes in the environment as a result of the development. Monitoring is also used to detect trends over time with respect to baseline conditions and the effects of the project on those baseline conditions.[546]

Monitoring is typically the responsibility of proponents, although the regulator and members of the public can also play a role. Monitoring provisions usually form part of the terms and conditions of the licence, and the proponent's environmental management plan. The extent of the monitoring requirements imposed on a proponent depends on the location, size, complexity and predicted effects of the development. Under Manitoba's Act, the Director or Minister may require information about a proponent's post-licensing plans, but monitoring is not mandatory.[547] Under other statutory models, monitoring or follow-up plans may be required information for an environmental assessment report, and some expressly require monitoring for every approved development.

In Alberta, Section 49 of the *EPEA* provides that the environmental impact assessment report shall include, among other things, the plans that have been or will be developed to monitor environmental effects that are predicted to occur and the plans that have been or will be developed to monitor proposed mitigation measures.[548] In Nova Scotia, Section 41(a) of the *Environment Act* provides that where an approval has been given, the Minister shall require the proponent to carry out environmental and rehabilitation studies and programs in order to determine the effect of mitigation measures.[549] Section 41A of Nova Scotia's Act also allows the Minister to amend a term or condition of an environmental assessment approval as it relates to a monitoring or reporting requirement where an adverse effect or unacceptable environmental effect has occurred or may occur.[550] In Newfoundland and Labrador, section 57 of the *Environmental Protection Act* provides that an EIS shall include a proposed program of study designed to monitor all substances and harmful effects that would be produced by the undertaking.[551] Section 69 of Newfoundland and Labrador's Act provides that the Minister may require a proponent to carry out environmental monitoring and rehabilitation studies and programs in order to determine the effectiveness of mitigation measures, compliance with applicable terms and conditions, and to restore the affected environment to ecologically and socially acceptable levels.[552] The British Columbia Environmental Assessment Office guidelines encourage proponents to develop a table of monitoring commitments that can be attached to the environmental assessment certificate and become legally binding.[553]

ii) Auditing

Auditing refers to a process by which auditors verify the proponent's monitoring program, procedures, reports and results to ensure compliance with licensing conditions and environmental standards. Manitoba's Act currently authorizes environment officers to inspect licensed developments, but is silent on the power of the regulator to conduct a full audit or to require a third party audit.[554] In Canada, provincial and federal auditors have conducted audits of various aspects of the environmental assessment process.[555]

iii) Enforcement and Compliance Provisions

A flexible and responsive environmental assessment system depends on a full range of compliance and enforcement provisions. Manitoba's Act has several provisions relevant to enforcement such as: the power to require a new proposal when evidence warrants a change in the licence for Class 3 developments only; the power to suspend or cancel a licence in cases of violation; and the power to charge and prosecute an offender.[556] Manitoba also has an Environmental Compliance and Enforcement Branch within the Department of Conservation and Water Stewardship.[557] Compliance issues are brought to the attention of the Environmental Compliance and Enforcement branch in one of three ways:

- Through the licensee's self-reporting of monitoring information;
- Through inspections authorized under section 20[558]; and
- Through complaints by members of the public.

The Branch publishes an Environmental Legislation Enforcement Summary online. The summary provides the number of prosecutions, warnings and orders, and the total amount of fines imposed under various environment-related statutes, including *The Environment Act*. The Department's annual reports include similar information, in addition to a list of suspensions or variations under *The Environment Act*.

Other Enforcement Mechanisms

Most Canadian provincial jurisdictions have provisions for inspections and prosecutions similar to those in Manitoba. However, some provincial statutes contain additional or different enforcement and compliance provisions. For example, in British Columbia, the Minister may give the holder of an environmental assessment certificate the opportunity to make a written compliance agreement with the Minister.[559] A person who has made a written compliance agreement with the Minister cannot be charged under the Act with respect to the contravention that is the subject of the compliance agreement.[560] British Columbia's Act also requires that the Minister give a licensee the opportunity to be heard before suspending a license, except in emergency situations.[561]

In Alberta, the *EPEA* provides that any two persons may apply to have an investigation of an alleged offence under the Act.[562] The Minister must commence an investigation on receipt of such an application. The *EPEA* allows the Director to amend an approval on his or her own initiative if an adverse effect that was not reasonably foreseeable at the time the approval was issued has occurred, is occurring or may occur.[563] The *EPEA* also expressly preserves civil remedies that might be available in respect of acts or omissions that are also offences under the Act.[564] The Act provides that any person convicted of an offence under the Act may be sued for damages suffered as a result of the conduct that constituted the offence.[565] Section 76 of the *EPEA* requires licensees to provide any new evidence respecting actual or potential adverse effects resulting from the licensed development.

Ontario's *Environmental Assessment Act* allows the Minister to make inspection of the development a condition of the final approval.[566] A proponent who has received approval must promptly notify the Minister if that person is unable to comply with the approval as a result of a change in circumstances.[567] In addition to other remedies, Ontario's Act permits the Minister to apply to the Divisional Court for an order to prevent proponent from proceeding with an undertaking contrary to the Act.[568] The *CEAA, 2012* also provides for injunctions.[569] It is an offence under Ontario's Act to knowingly provide false information under the Act.[570] This is also an offence under the *CEAA, 2012*[571] and Nova Scotia's *Environment Act*[572]

In Newfoundland and Labrador, any person may request an investigation of an alleged offence under the Act.[573] In this jurisdiction it is also a statutory condition of approval that the licensee must permit inspection.[574] The *Environmental Protection Act* also allows the Lieutenant Governor-in-Council to make regulations with respect to administrative penalties.[575] The regulations indicate that administrative penalties will be imposed for offences related to emissions and the release of pollutants.[576] In Nova Scotia, any person may apply to have a potential offence investigated.[577] Licensees may enter into a compliance agreement which prevents them from being charged in respect of the subject matter of the compliance agreement.[578]

Administrative Penalties

Another enforcement mechanism increasingly used in Canadian jurisdictions is administrative penalties. Administrative penalties are monetary penalties that are assessed and imposed by a regulator generally without recourse to a court or independent administrative tribunal. For example, the federal government enacted the *Environmental Violations Administrative Monetary Penalties Act* in 2009.[579] The Act provides a complete code for establishing a system of administrative penalties and enforcing certain aspects of environmental legislation, including the *Canadian Environmental Assessment Act 2012*.[580] In Alberta, the *Administrative Penalties Regulation* sets out the provisions of the *EPEA* that can attract an administrative penalty.[581] This includes the provisions prohibiting a person from operating a development without the necessary approval and from changing the activity that is subject to approval without notification. The requirement to provide any new information concerning actual or potential adverse effects is also subject to the administrative penalty provisions. Although Manitoba employs the use of administrative penalties in several statutes, there is currently no such provision in Manitoba's Act.[582]

iv) Program Evaluation and Adjustment

Program evaluation refers to a review of the environmental assessment system overall, with particular reference to past licensed projects. Program evaluation measures the system's cost effectiveness, the reliability of predictive methods and safeguards, and the extent to which the system is working as intended. Such review has occurred in Manitoba on an *ad hoc* basis, and similar undertakings have occurred in other jurisdictions.[583] For example, the Auditor Generals in both British Columbia and Canada have conducted program reviews of the environmental assessment systems operating within those jurisdictions. The *Canadian Environmental Assessment Act 1999* provided for mandatory five-year reviews of the legislation.[584] Ontario's *Environmental Assessment Act* empowers the Minister to conduct studies of environmental planning or environmental assessments.[585]

v) Access to Information

An important aspect of post-licensing procedures is the distribution of the information gathered during the post-licensing phase of the environmental assessment process. As discussed previously, public access to information at all stages of the environmental assessment process is important in order to maintain transparency. Without access to the results of monitoring, auditing, and review mechanisms, it is difficult for the public and government bodies to ensure that plans are being properly carried out, and that proponents are held accountable for violating the terms and conditions of the final licence. While the communication of information gathered during post-licensing activities does occur in Manitoba, the Act is currently silent on this point.[586] However, other environmental assessment legislation, like *CEAA, 2012*, includes legislative mechanisms that require public access to post-licensing information, such as: "environmental and emission monitoring data and the processing information that is necessary to interpret that data."[587]

The Environment Act: Recommendations

The majority of the post-licensing activities discussed above are set out in the terms and conditions attached to a license/approval/certificate. In Manitoba, final licences typically contain a range of different requirements for post-licensing activities. However, since there are no mandatory requirements for post-licensing activities under the Act, such requirements and other licensing criteria can vary depending on the type of project, the issues identified during the review process, and industry specific practices. As identified by participants, the fact that there is little certainty when it comes to the post-licensing activities required by final licences is problematic, to both the public and proponents. In order to increase certainty and transparency, basic mandatory legislative requirements should be added to the Act. Such mandatory criteria could include: management plans, monitoring plans, auditing, and regular review of post-licensing activities. Regulations and guidance material outlining the Act's mandatory post-licensing activities and explaining how such activities should be undertaken would further improve process certainty and transparency. Standards for post-licensing activities could also be adopted under s. 43(1) of the Act.[588]

Participants also identified a need for government authorities to be able to audit a proponent's post-licensing activities to ensure that the construction and operation of a development is in compliance with the terms and conditions that were included in the final licence. While some recent licenses have included such provisions, these auditing practices are not currently a mandatory requirement under the Act. It is suggested that a mandatory requirement for regular government audit and/or a provision expressly stating that government authorities have the power to audit post-licensing activities should be added to the Act in order to maintain consistency and ensure post-licensing activities are working to protect the environment as planned.

Another means of improving the transparency and certainty of post-licensing activities is to ensure that post-licensing reporting requirements and enforcement activities, with public access to such information, are clearly set out in the Act. Ideally, such information should be included in the public registry, with linkages to any additional information locations, such as the websites set up for recently licensed Class 3 developments.[589] Including an enforcement provision that creates penalties for presenting false information, like the federal and Ontario examples discussed above, should also introduced.

Previous law reform initiatives in Manitoba have identified gaps in the Act's enforcement provisions.[590] As discussed in Manitoba Conservation's 2014, *Environment Act Consultation* document, "it is critical to have an array of enforcement measures that ensure compliance with processes to effectively protect the environment."[591] A range of participants identified a need to improve the Act's enforcement mechanisms and expand the range of enforcement options. The Government of Manitoba has also identified this need and has suggested enhanced compliance tools, such as administrative penalty provisions, judicial orders, injunctions, and "stop work" orders.[592] The Commission supports these reforms and suggests that guidance material be developed to better explain the post-licensing activities that occur in Manitoba, including such enforcement mechanisms.

Regular and public review of Manitoba's environmental assessment and licensing process is another issue identified by participants as important. While such review has occurred in Manitoba on an *ad hoc* basis, a mandatory legislative requirement for regular and formal review of the environmental assessment program by the provincial government would have many benefits, such as process improvements and better environmental outcomes. The involvement of the public, proponents and other interested parties would ensure that changing industry standards, social norms, and scientific innovations are properly addressed by the Act.[593]

Recommendations:

9.1 Sections 10, 11, and 12 should be amended or replaced with provisions that set out mandatory post-licensing requirements for licensed developments such as, but not limited to:

- **Monitoring plans;**
- **Environmental management and protection plans;**
- **Auditing requirements and timelines; and**
- **Program evaluation requirements and timelines.**

Such requirements should be required to be discussed by the proponent in a proposed project's EAP and EAR.

9.2 The Act should be amended to expressly provide the Minister with the power to audit a proponent's post-licensing activities after a licence is issued. The Act should also be amended to empower the Director or Minister to periodically review licences and licensing conditions and require amendments if necessary.

9.3 The Act should be amended to include a broader range of enforcement provisions including, but not limited to:

- **Penalties for knowingly providing false information;**
- **Administrative penalties; and**
- **Injunctions and "stop work" orders.**

9.4 The Act should be amended to require regular formal review of the environmental assessment and licensing system in Manitoba.

9.5 Section 17 of the Act should be amended to require the inclusion of post-licensing monitoring, auditing, enforcement, and review information produced by both the proponent and government in public registry files. This requirement should be made subject to provisions for the protection of proprietary or other confidential information.

D. Other Issues

As previously discussed in this Report, there is a wide range of issues and interests involved in any environmental assessment and licensing process. The *Consultation Report* published in January 2015 addressed those issues that the Commission had identified as most important to Manitobans; however, a number of participants were concerned that the range of topics discussed was too narrow and that certain important issues had been excluded. Therefore, the following sections have been added to this Final Report in response to this input and incorporate information previously presented in the Commission's January 2014 *Discussion Paper*.

10. Strategic Environmental Assessment

Strategic environmental assessment ("SEA") is a process by which government assesses the environmental effects of its own policies, plans and programs.[594] While development assessment processes focus on concrete and pre-determined project plans, SEA is instead aimed at identifying development goals and strategies for a particular sector or region.[595]

SEA is often considered to create the best opportunity for discussing and addressing the potential cumulative environmental effects and the need for and alternatives to various types of developments.[596] In particular, Regional Strategic Environmental Assessment ("RSEA"), a type of SEA, has been supported as an important way to ""inform the preparation of a preferred development strategy and environmental management framework(s) for a region."[597] RSEA is seen as particularly important due to its close connection to and association with Regional Cumulative Effects Assessment ("RCEA"), discussed in a later section of this Chapter.

RSEA is often discussed in the context of planning for specific sectors. It has potential applications for integrated land-use planning, urban planning, watershed management, regional energy strategies and conservation and protected areas planning. It may apply most usefully to specific ecological components, such as a species of animals or particular natural resources within a region.

Since SEA and RSEA generally occur before the narrower and more specific development assessment process, this type of assessment has also been discussed as a key factor in achieving sustainability, since it allows for the integrated consideration of environmental, economic and social factors at an early stage.[598]

SEA in Canadian Jurisdictions:

SEA and RSEA can be implemented in various ways. Many jurisdictions provide for strategic environmental assessment through administrative order, cabinet directive or policy guideline.[599] Some provincial statutes have gone a step further and incorporated a form of strategic environmental assessment into their environmental assessment legislation by including statutory language that grants the decision-maker discretionary power to require the environmental assessment of a plan or program.[600] A challenging aspect of strategic environmental assessment is its connection to individual development assessment processes. Before its repeal in 2012, the *Canadian Environmental Assessment Act* addressed this issue, providing that the results of relevant regional environmental studies should be taken into account at the project level.[601] While Manitoba has not yet created a legislative mechanism for SEA or RSEA to be utilized in connection to the environmental assessment and licensing regime, there are SEA-type activities taking place outside the scope of *The Environment Act*. Examples include integrated watershed management plans such as the Assiniboine Delta Aquifer Management Plan and the Swan Lake Basin Management Plan.[602]

The Environment Act: Recommendations

The Commission does not propose to recommend a legislated framework for SEA. While its merits are undisputed, there is no single best approach recognized for SEA implementation. Such an implementation strategy depends on individual circumstances and a flexible approach that should be developed in partnership with the public and other individuals involved in such an SEA process.[603] There may, however, be merit in considering ways to address strategic environmental assessment within the existing legislative framework. As mentioned, some jurisdictions expressly authorize the minister to order the environmental assessment of a program or plan.

Another possibility is to grant discretionary power to trigger strategic environmental assessment when a project-level assessment reveals a clear absence of publicly available cumulative environmental information.[604] Such engagement might include participation in multi-stakeholder regional environmental studies, the sharing of relevant data and the creation of regional environmental standards. Participation in regional studies has already been made a licensing condition in some cases, but could be formalized in the Act.[605]

Recommendations:

10.1 *The Environment Act* should be amended to include a legislative provision that grants the Minister discretionary power to require SEA/RSEA and the mandatory participation of appropriate parties in such undertakings.

10.2 *The Environment Act* should be amended to include a provision that requires the results of any relevant SEA and/or RSEA be discussed in a development's EAP and Environmental Assessment Report, as applicable.

11. Consideration of Alternatives

The consideration of alternatives is an issue that has been discussed by participants since the beginning of this project, with little agreement about how such considerations should be incorporated into Manitoba's environmental assessment and licensing regime. Considerations of alternatives can involve a discussion of the need for a development; alternatives within the project relating to process, site and structure; alternative means of addressing an identified need (alternative developments); and the potential environmental, socioeconomic, and cultural effects of a proposed development and its alternatives.

The consideration of alternative means of undertaking a proposed development is commonly included in Canadian environmental assessment regimes. However, other related considerations, such as the "need for and alternatives to" a development are inconsistently required in Canadian jurisdictions.[606] One of the main problems associated with creating a formal role for the consideration of alternatives in environmental assessment is that such considerations are often assumed to occur early in the planning stages before the environmental assessment process is even initiated.[607]

Although there is little consensus about the consideration of alternatives in environmental assessment and licensing, it is generally accepted that a consideration of alternative means of undertaking a development (construction processes, location, etc.) is reasonable for the majority of developments and is often required in Canadian environmental assessments.[608] Therefore, this section will focus on considerations of the more controversial "need for, and alternatives to" analysis that has been increasingly promoted as an important and necessary consideration for environmental sustainable decision-making processes.

NFAT Analysis

The consideration of the need for, and alternatives to, a proposed development ("NFAT") is often described in environmental assessment literature as best practice, and the "key to creative, proactive and decision relevant assessment."[609] Most commentators agree that NFAT should ideally occur at a strategic level (government practice/policy/planning). This is in large part due to the fact that NFAT is considered to be challenging at an individual development assessment level especially since, in many cases, feasible alternatives will no longer be practically available by the time a project reaches the regulatory assessment stage.

There are also legitimate questions about whether NFAT is necessary and appropriate for all proponents and all developments. Public proponents, for example, may be best placed to articulate the need for the project in broad public interest terms, and to explore a full range of alternatives.

In Manitoba, a formal assessment of the need for and alternatives to a proposed development has only occurred twice. The first time was for the Wuskwatim Generating Station development during a combined environmental assessment/NFAT hearing before the CEC in 2004. The second occurred in the spring of 2014 and involved assessment of Manitoba Hydro's preferred development plan for hydroelectric generation in Manitoba. This proceeding involved consideration of various developments, for example, Keeyask Generating Station, Conawapa Generating Station, and potential transmission lines to the United States. This second proceeding was undertaken by the Public Utilities Board at the request of the Minister of Conservation and Water Stewardship.

This type of NFAT analysis is not a mandatory requirement of Manitoba's environmental assessment and licensing regime and was undertaken both times at the request of government decision-makers. However, a consideration of alternatives to the proposed development's processes and locations may be required by the Director or Minister for Class 2 and 3 developments as part of the environmental assessment process under the Act.[610] *The Environment Act Proposal Report Guidelines* also suggest that an analysis of the need or rationale for the development, purpose and alternatives ought to form part of an Environment Act proposal ("EAP").[611] The binding *Licensing Procedures Regulation* is silent on the consideration of needs for and alternatives to the development in an EAP.

Alternatives in Other Jurisdictions

As with most aspects of environmental assessment, there is considerable variance across Canada when it comes to considerations of alternatives. Some Canadian jurisdictions are silent on the issue, while others have developed regulatory regimes that specify NFAT as a requirement for all EIS.[612]

At the federal level, many assessments carried out under the old *CEAA* required a consideration of needs for and alternatives to the project. NFAT analysis was not mandatory under *CEAA*, but was reportedly standard practice. The new *CEAA, 2012* requires a consideration of alternative means of carrying out the designated project,[613] but does not require a consideration of the need for or alternatives to the project itself.

The Environment Act: Recommendations

In its *Review of the Canadian Environmental Assessment Act* (1999), the Canadian Environmental Assessment Agency identified the benefits of a NFAT analysis: "Avoidance of impacts through the consideration of alternatives is one of the least expensive and most effective ways of ensuring sustainability. Cost savings to proponents have included the avoidance of mitigation measures, lower risk and the need for fewer regulatory permits."[614]

While often considered to be inappropriate for most proponents, NFAT analysis does not actually have to be an onerous requirement. If proper policy and guidance documents are developed, articulating the need for a project and identifying appropriate alternatives can be straightforward for both private and public developments. For example, guidelines could be developed to identify appropriate ranges of alternatives in the context of particular developments. However, it is likely that greater institutional capacity for NFAT analysis would be required if formally incorporated into the environmental assessment and licensing regime, particularly in the context of public hearings.

More extensive use of strategic environmental assessment that includes the incorporation of NFAT analysis could also help reduce the burden on individual proponents to discuss alternatives during the environmental assessment process. In this regard, an NFAT analysis should be multidisciplinary in nature so that economic, technical and other aspects are considered at the same time and level as environmental aspects.

Although an NFAT analysis has occurred several times in Manitoba, there is still no consensus on the application of such analysis to the environmental assessment and licensing process. Participants provided the Commission with a range of feedback that included suggestions for formalization of such analysis in the Act, the development of guidance materials and regulations, and more clarity in relation to who should be responsible for undertaking and reviewing a proposed development's NFAT analysis.

Despite the fact that NFAT analysis is increasingly identified as best practice in Canada and has been incorporated into the environmental assessment and licensing regime of some Canadian jurisdictions, it is still unclear what role this type of analysis should have in Manitoba. It appears to be necessary for the government to develop a more supportive policy framework for this analysis and produce guidance materials to assist with future NFAT analysis in Manitoba. Therefore it may be appropriate to phase in a formal requirement for NFAT analysis in Manitoba's environmental assessment and licensing regime, starting with formalized discretionary power for decision-makers to require proponents to undertake NFAT analysis at the project and/or strategic level as deemed appropriate.

Recommendations:

11.1 ***The Environment Act*** **should be amended to include a legislative provision that grants the Minister discretionary power to require a proponent to undertake a NFAT analysis at the project and/or strategic level. Guidance materials should be produced to assist with such analysis.**

11.2 ***The Environment Act*** **should be amended to include a legislative provision that requires the results of any relevant NFAT analysis to be discussed in a development's EAP and Environmental Assessment Report, as applicable.**

12. Cumulative Effects Assessment

Cumulative effects are changes to the environment caused by an action in combination with the changes caused by other past, present and future actions.[615] The consideration of cumulative effects is central to environmental assessment as a tool for sustainability, particularly in areas where multiple large-scale projects operate or are planned.[616] This type of assessment can be undertaken at both the project and strategic levels.

Although often acknowledged as a best practice, cumulative effects assessment ("CEA") is viewed as methodologically complex and there are challenges to its effective implementation. These challenges include determining the proper scope of assessment in terms of both geographic proximity and time; identifying past, present and future actions; dealing with multiple stakeholders and cross-jurisdictional issues; establishing appropriate baseline data; and determining the proper roles of proponents, regulators, and members of the public.

Some experts believe that CEA is not well suited for inclusion in project-level assessment, either conceptually or operationally.[617] This has led to calls for more strategic environmental assessment initiatives, as discussed in the previous section. However, the consideration of CEA at the individual development level can be particularly important, especially in the absence of a formal legislative mechanism for SEA.

CEA in Canadian Jurisdictions

Although *The Environment Act* and regulations are silent on the need for CEA at either the development or strategic level, it is not uncommon for proponents to address cumulative effects during the environmental assessment and licensing process. This typically occurs in relation to large developments with the potential for widespread and extensive effects. The Government of Manitoba has also recently acted on the recommendation of the Clean Environment Commission and has required a Regional Cumulative Effects Assessment to be undertaken "for all Manitoba Hydro projects and associated infrastructure in the Nelson River sub-watershed".[618]

Other jurisdictions have addressed CEA and have published guidance on effective CEA.[619] Alberta's guidelines, for example, provide general guidance, recognizing the need for flexibility while suggesting certain basic questions that should be answered in any CEA process.[620] Alberta's system allows the CEA requirement to be tailored to suit the particular circumstances of individual projects. Other statutory models for environmental assessment address CEA more directly, making it a requirement of every EIS, or identifying it as a factor in decision-making.[621]

The Environment Act: Recommendations

Although there is not yet formal incorporation of cumulative effects assessment in Manitoba's environmental assessment process, this type of analysis has been increasingly championed as a necessary part of responsible, modern and sustainable environmental assessment procedures.[622]

To reduce the burden of CEA on individual proponents, it is generally agreed that better technical guidance is required and that government should have an active role in assembling and publishing cumulative environmental information.[623] In most cases, proponents cannot reasonably be expected to gather data from competitors in the region, and the obligation should only extend to reliance on publicly available information. It may also be reasonable to phase in requirements for CEA in Manitoba's environmental assessment process, starting with discretionary powers to require such analysis.

Effective CEA also depends on the existence of thresholds, and other useful cumulative environmental indicators.[624] Additional work should be undertaken by the government of Manitoba to work in partnership with the public, proponents, legal practitioners, Aboriginal communities and other interested parties to develop Manitoba specific criteria for CEA analysis to build capacity in this regard.

Recommendations:

12.1 ***The Environment Act* should be amended to include a legislative provision that grants the Minister discretionary power to require a proponent to undertake a CEA at the project and/or strategic level.**

12.2 ***The Environment Act* should be amended to include a legislative provision that requires the results of any relevant CEA to be discussed in a development's EAP and Environmental Assessment Report, as applicable.**

12.3 **The Government of Manitoba should develop and produce guidance materials, in partnership with the public, proponents, practitioners, and Aboriginal communities that provide assistance with undertaking and reporting the results of CEA in Manitoba.**

13. Significance

The concept of significance is central to the environmental assessment process. Significance is a subjective notion or value judgement determined by the importance that stakeholders attach to specific effects of a proposed development. Although it is not always expressed in legislation, the significance of a project's environmental effects underlies decisions about whether an EA takes place and what steps ought to be included in the environmental assessment. Significance is relevant to critical activities such as scoping, determining mitigation factors, deciding on whether to hold a public hearing and imposing conditions on licenses. The measure of significance also influences what information must be provided and what analysis must be applied in the environmental assessment process.

Significance in Canadian Jurisdictions

The term "significant" is not defined in *The Environment Act* and its regulations, or in any published guidelines. However, the term "significant" and the related term "insignificant" appear at several key places in the Act including its stated purpose and the definition of "development".[625] The term "significant" is used separately from the term "significant adverse effect" in the legislation, which suggests that it might encompass both positive and negative effects. This lack of definition and the confusing usage of the term have contributed to the lack of transparency and process certainty that participants associate with Manitoba's current environmental assessment and licensing process.

Some other jurisdictions have attempted to provide guidance and clarity for the determination of "significance" in environmental assessment processes. Some jurisdictions define "significance" in their environmental assessment legislation or provide guidance about undertaking significance determination in published bulletins and guidelines.

For example, Nova Scotia's Regulations provide the following definition of "significant":

> "Significant" means with respect to an environmental effect, an adverse effect that occurs or could occur as a result of any of the following:
>
> i. the magnitude of the effect;
> ii. the geographic extent of the effect;
> iii. the duration of the effect;
> iv. the frequency of the effect;
> v. the degree of reversibility of the effect;
> vi. the possibility of occurrence of the effect.[626]

Federally, the Canadian Environmental Assessment Agency provides guidance on how to determine if an effect is significant through a reference guide. Significance is evaluated based on residual environmental effects which may be either significant or insignificant. The guide refers to five principal factors: magnitude of the effect; geographic extent of the effect; duration and frequency of the effect; extent to which the effect is reversible or irreversible; and ecological context.[627]

***The Environment Act:* Recommendations**

Although other jurisdictions have taken additional measures to assist with significance determinations, like the definition seen in Nova Scotia's regulatory regime, it remains unclear whether such legislative mechanisms have contributed to addressing the confusion associated with significance determinations in environmental assessment.

Due to the important role the concept of significance plays in environmental assessment processes, it seems important that at the very least, publicly available guidance materials be developed to assist proponents with significance determinations in Manitoba. Providing such information will assist with improving the transparency of Manitoba's system and will improve process certainty for all participants.

Since significance determinations are supposed to reflect the values, interests, and concerns of the various stakeholders participating in the environmental assessment and licensing process, it is important that any guidance material and future legislative mechanisms be developed in partnership with the public, proponents, legal practitioners and Aboriginal communities.

Recommendations:

13.1 Guidance material should be developed by the Government of Manitoba, in partnership with the public, proponents, legal practitioners and Aboriginal communities, to assist with the determination of significance in Manitoba's environmental assessment process.

14. Existing Developments

In most jurisdictions, projects that were completed prior to the enactment of environmental assessment and licensing legislation are generally considered exempt from the environmental assessment regime. This is usually through the inclusion of language in the regulatory scheme that explicitly exempts such projects from the new legal regime. In some cases, such provisions will contain a mechanism for bringing pre-existing developments under the new legislation.

In Manitoba, it seems to be assumed that developments that were completed before *The Environment Act* was enacted in 1988 are exempt from the environmental assessment and licensing process.[628] There are currently a number of developments that are in operation in Manitoba that are not required to comply with *The Environment Act* due to the fact that they predate the legislation. Many of these developments are hydroelectric generating stations that were built in the 1960s and 1970s.[629] There are existing mining operations that also likely fall into this category of pre-existing developments.

Developments that are exempt from *The Environment Act* have likely never undergone an environmental assessment and are not required to comply with the reporting, mitigation, conservation and other monitoring activities that are usually required by an Environment Act Licence. Such an exemption also prevents pre-existing developments from triggering an environmental assessment under s. 14 of the Act (licence alterations).

The Environment Act does not contain explicit language that exempts pre-existing developments, as seen in other jurisdictions.[630] There is no case law in Manitoba addressing pre-existing developments and the Act is silent on this issue.

Although *The Environment Act* does not appear to contain an exemption clause, it does contain a mechanism that allows projects that were in operation before 1988 to trigger a review under the Act. For each Class of Development, a corresponding section exists that addresses "existing developments".[631] This category of development is not defined in the Act or the Regulations.

Sections 10(2), 11(6) and 12(2) of the Act give the Minister the discretionary power to require the proponent of an existing development to file an EAP with the EAB if "no existing limits, terms or conditions exist by licence or regulation" for a development. There are no legislated requirements for when such a decision should be made and what criteria should be considered when making such a decision. There is no mechanism that allows reasons for such a decision to be obtained by proponents or the public.

***The Environment Act*: Recommendations**

The wording of sections 10(2)(b), 11(6)(b), and 12(2)(b): "where no existing limits, terms or conditions exist by licence or regulation; the minister may require any person operating an existing Class [1, 2, or 3] development to file a proposal with the department, to be considered under this section" acknowledges that there are projects that may not have a licence under the Act, and provides a legal mechanism for bringing existing developments that do not currently have an Environment Act Licence under the legislative framework. This does not appear to be restricted to alterations or additions to existing projects, but appears to be potentially applicable to all existing developments.

However, based on the province's treatment of several projects that fall into the category of "existing developments", it appears that only the potential changes to such projects have been assessed under the Act instead of the potential effects of the project as a whole.[632] This has been identified as problematic by a range of participants.

In order to clarify when and how the above mentioned sections should be used it would be helpful to define the term "existing development" in the Act, and to include decision-making criteria to assist the Minister with determining when it may be appropriate to require an existing development to undergo environmental assessment. Such criteria would assist with creating more process certainty for all participants and would contribute to a more transparent environmental assessment and licensing process. As with any discretionary decision, a legal mechanism that allows the public to access the Minister's reasons for making such a decision would also improve the transparency of a legal system, and would help clarify why and how certain decisions are made.

Another legal possibility considered by the Commissioners is the creation of a 4th Class of development to be described in the Act and regulations that could set out criteria for bringing developments that were completed before 1988 under the environmental assessment and licensing regime. While the Commission finds this to be an interesting idea, the logistics of such an amendment would need further consideration and consultation with stakeholders before such a recommendation could be made.

Recommendations:

14.1 Section 1(1) of the Act should be amended to include a definition for the term "existing development".

14.2 *The Environment Act* should be amended to include decision-making criteria for when an existing development is considered for possible review under sections 10(2), 11(6) or 12(2).

14.3 *The Environment Act* should be amended to include provisions that allow proponents and members of the public to obtain reasons for a decision made by the Minister to require an existing development to undergo the environmental assessment process.

15. Staged Licensing and Project Splitting

One of the most heavily criticised aspects of Manitoba's environmental assessment and licensing process is the legislative mechanism that allows a development to be licensed in stages.[633] This provision appears to be unique to Manitoba's environmental assessment and licensing process. Section 13(1) authorizes the Minister or Director to issue a licence in respect of a specified stage in the development's construction or operation. In practice, this section permits the separate assessment and licensing of, for example, the construction of an industrial facility, the construction of infrastructure to support the facility, and the operation of the facility.

A range of participants identified this aspect of Manitoba's process as problematic since it permits the separate consideration of factors that in reality act in concert to produce environmental, economic and social effects. In its application, the staged licensing provision has the potential to be inconsistent with principles of sustainability in large part because this legislative mechanism can prevent a comprehensive consideration of a development's aggregate effects.

Although section 13(1) may have been enacted with a legitimate efficiency-related purpose in mind, many participants questioned whether this provision is consistent with a modern approach to environmental assessment. The *Report on the Consultation of Sustainable Development Implementation* (COSDI) addressed this issue, recommending that staged licensing be contingent on a determination that environmental effects of the project as a whole are insignificant or can be mitigated with known technology.[634] Due to the confusion surrounding the purpose and application of this section of the Act, the Commission recommends the repeal of section 13(1).

Another related and heavily criticised aspect of Manitoba's environmental process is the issue of project splitting. The Act currently does not prevent a large project being broken into different parts and assessed separately. For example, three separate licences were issued in relation to the Keeyask generation station development: Keeyask Generation Project (No. 3107), Keeyask Transmission Project (No. 3106), Keeyask Infrastructure Project: All-Weather Gravel Road, Provincial Road 280 (No. 2952R).

The Minister currently has no statutory authority to combine related parts of a development into a single assessment if they are presented as separate proposals, as seen in the case of the Keeyask Generation Project. The addition of such authority would ensure more comprehensive environmental assessments take place and that the potential environmental effects of all aspects of a development are properly assessed. The Act could be amended to provide the Minister with this authority, similar to what has been done in other Canadian jurisdictions.[635]

Recommendations:

15.1 Sections 13(1) to 13(3) of *The Environment Act* should be repealed.

15.2 The Environment Act should be amended to include a legislative mechanism that grants the Minister discretionary power to require the combined assessment of developments which have been split or licensed in stages.

16. Alterations and Review of Licences

As first discussed in the Commission's January 2014 *Discussion Paper*, participants have identified problems with the way that Environmental Act licences are altered and reviewed. One such problem is that the majority of environmental licences issued under the Act do not contain expiration dates.[636] This means that most developments can essentially operate under an environment act licence for an unlimited amount of time unless a major alteration is made to the development.

While the Act allows the minister to suspend or withdraw a license if the Act or any provision of the licence is being violated, it does not expressly permit the Minister to resolve significant environmental problems resulting from a development that is complying with its licence. This means that there is no way to amend the licences of most developments in Manitoba, even if new or previously unrecognized adverse environmental effects occur as a result of the development's operation.

Another problem that is commonly identified is the treatment of alterations as either "minor" or "major" under section 14 of the Act. If an alteration is considered to be "major", proponents are required to obtain approval by submitting an EAP and may potentially have to undergo an environmental assessment. However, the Minister currently has discretionary power to consider an alteration "minor" if "the potential environmental effects resulting from the alteration are insignificant or will be accommodated by the ongoing assessment process" and approve it with no public scrutiny under section 14(2) of the Act. The Act does not contain a definition of "insignificant" or "minor alteration" and there are no decision-making criteria or guidance materials available to assist with determinations of whether an alteration is "major" or "minor". There is no mechanism available for proponents or the public to obtain reasons for decisions related to alterations.

Although section 14(2.1) of the Act requires that a copy of the approval of a proposed minor alteration, and the name of a contact person, be filed in the public registry, it has been identified as problematic that in most cases, only the most recent version of a development's licence is available which prevents the public and other interested parties from comparing older versions of a development's licence to determine the scope and effects of the approved alteration.

The Environment Act: Recommendations

In its paper, *Building a Sustainable Future, Proposed Changes to Manitoba's Environment Act* (2001), Manitoba Conservation recommended that the Director or Minister be permitted to include a review clause in a license issued under the Act.[637] This type of clause would allow the Director or Minister to conduct a periodic review of the license requirements, and would describe the legal effect of such a review. Alternatively, reforming the Act to include a provision that requires Environment Act Licences to have a fixed term and therefore an expiration date, like the Forest Management Licences discussed above, would also create the opportunity to review and make alterations to such licences. In both cases, it is recommended that regulations and/or guidance materials be produced that describe the legal effect of a licence's expiration and the process for renewal in order to provide proponents with better process certainty.

In 2001, Manitoba Conservation also recommended that the Act be amended to allow the Director to initiate a process to review and amend a licence where significant adverse environmental effects might occur with continued operation of the development as licensed. Conservation commented that, "there is currently no overt capability to include the requirement to review a license in a given timeframe to determine its performance in protecting the environment."[638]The Commission supports both of the above recommendations made by Manitoba Conservation and suggests that a legislative mechanism be added to the Act that gives decision-makers discretionary power to require the review of already licensed developments if there is risk of new or previously unrecognized adverse environmental effects.

The Commission also recommends clarification of process for approving alterations. Such clarification should involve, at the very least, guidance material outlining the process and criteria for determining whether an alternation is "minor" or "major". The amendment or replacement of section 14 to incorporate decision-making criteria for making such determinations would also assist with improving process certainty and transparency in relation to alterations. Section 17 of the Act should also be amended to require that all versions of a development's licence are available in public registry, not just the most recent version.

Recommendations:

16.1 ***The Environment Act*** **should be amended to include a legislative mechanism that requires Environment Act licences to have a fixed licence term and expiration date.**

16.2 ***The Environment Act*** **should be amended to include a legislative mechanism that gives the Director/Minister discretionary power to require the review of already licensed developments if there is risk of new or previously unrecognized adverse environmental effects.**

16.3 **Section 14 of the Act should be amended to incorporate decision-making criteria and corresponding regulations and/or guidance materials should be developed that outline the procedure and criteria for determining if an alteration is "minor alteration" or "major alteration".**

16.4 **Section 17 of** ***The Environment Act*** **should be amended to include a mandatory requirement that all versions of a development's licence are available in the public registry, not just the most current version.**

CHAPTER 5- SUMMARY OF RECOMMENDATIONS

A. Aboriginal Communities and Environmental Assessment

The Government of Manitoba should work in partnership with Aboriginal communities to determine and implement the best means of improving the involvement of Aboriginal peoples in Manitoba's environmental assessment and licensing process, and the integration of Aboriginal Traditional Knowledge into the decision-making process. [p. 35]

B. Sustainability Assessment

The Government of Manitoba should revisit the recommendations made by COSDI and work in partnership with the public, proponents, legal practitioners, Aboriginal communities and other interested parties to develop a strategy and timeline for transitioning Manitoba to a system of sustainability assessment. [p.38]

C. Manitoba's Environmental Assessment and Licensing Process

1. Administration of the Act

1.1 *The Environment Act* should be re-organized and divided into separate "Parts" that clearly indicate which sections of the Act relate to the various actions covered by the Act including, but not limited to:

- Administration
- The Clean Environment Commission
- Environment Act Proposals
- Environmental Assessment Reports
- Licensing and Implementation/Follow-up
- Enforcement [p. 42]

1.2 The existing regulations and guidance materials should be amended or replaced with new regulations and guidance documents should be developed that correspond to the environmental assessment and licensing provisions of the Act and describe the specific elements of the process in more detail. This includes but is not limited to:

- Environmental Assessment Reports
- Public Participation
- Enforcement
- Timelines [p. 42]

1.3 The Government of Manitoba, in partnership with the public, proponents, legal practitioners, Aboriginal communities and other interested parties, should evaluate whether the current purpose statement of *The Environment Act* as set out in Section

2 is still representative of the values and interests of Manitobans and if amendments should be made. Possible additions to be considered include, but are not limited to:

- Sustainability;
- Precautionary principle;
- Recognition of Aboriginal peoples in Manitoba and their rights under s. 35 of the *Constitution Act, 1982*;
- Strategic environmental assessment;
- Environmental leadership;
- Intergenerational equality;
- Polluter pays principle;
- Consideration of the feedback received through public participation mechanisms when exercising discretionary powers granted by the regulatory scheme. [p. 44]

1.4 The definition of "environment" found in Section 1(1) of the Act should be amended or replaced with a definition that includes, but is not limited to, a consideration of:

- air, land and water;
- all layers of the atmosphere;
- all organic and inorganic matter and living organisms;
- any building, structure, machine or other device or thing made by humans;
- social, cultural, economic, and aesthetic conditions and factors that influence the life of humans or a community;
- a solid, liquid, gas, odour, heat, sound, vibration, radiation or other produced energy resulting directly or indirectly from the activities of humans; and
- any part or combination of the foregoing and the interrelationships among any two or more of them. [p. 46]

1.5 Section 1(1) of the Act should be amended to include definitions for the following terms:

- Aboriginal Traditional Knowledge
- Environmental Assessment Report
- Significance
- Effect
- Impact [p. 47]

2. Public Participation

2.1 Section 1(1) of the Act should be amended to include language that makes the consideration of and incorporation of public input into environmental decision-making a purpose of the Act. [p.55]

2.2 The Act should be amended to include more mandatory requirements for public participation with legislated timelines. Appropriate points in the process may include, but are not limited to:

- Determination of the applicable class of development
- Review of scoping documents
- Review of the CEC terms of reference
- Review of an EAR [p. 56]

2.3 A larger variety of opportunities for the public to participate should be utilized throughout Manitoba's environmental assessment and licensing process. Criteria should be established, in the Act or in the regulations, that sets out when it is appropriate for the Minister to establish a public advisory committee and require the CEC to fulfill its duty to act as a mediator under s.6(5)(d). The addition of a provision allowing for the use of petitions under the Act should also be considered. [p. 56]

2.4 The guidance documents currently available to the public should be amended or replaced with new guidance material that outlines in detail:

- Available opportunities for public participation and the process involved for each;
- A summary of Manitoba's environmental assessment and licensing process that includes specific details about the various available levels of assessment, the role of Aboriginal communities, mandatory and discretionary elements of the current process, etc.;
- The requirements for the production and review of EAPs;
- How decisions are made at the various steps of the process, including a description of the government authorities involved;
- The appeal process and associated timelines;
- Other important elements identified by the public, proponents, and other stakeholders in the process. [p. 56]

2.5 Section 17 of the Act should be amended or replaced with a section that sets out the materials that are required to be included in public registry files. Such requirements should include, but are not limited to:

- Index of all materials contained in each file, including material that may not yet be available; and
- Additional regulatory project requirements such as permits and licences issued under other Acts. [p. 56]

2.6 The Act should be amended to include a mandatory requirement that decision-makers consider the input of the public at all decision-making stages of the process. Such decisions include:

- Determining the level of assessment/class of development
- The need for a public hearing
- Scope of environmental assessment
- Final licensing decision [p. 56]

2.7 The Act should be amended to allow proponents and members of the public to acquire reasons for the following decisions:

- Class of development/level of assessment
- Scope of environmental assessment
- CEC terms of reference
- Final licensing decision
- Appeals [p. 57]

3. Triggering an Environmental Assessment

3.1 Section 16 of The Environment Act should be amended to expand the Minister's discretionary power to include the ability to decide on the classification of a development, or to require an environmental assessment for a particular project that is not contemplated in the existing list of developments. This expansion of discretionary power should be accompanied by decision-making criteria in the same, or following section of the Act. [p. 59]

3.2 The criteria included in the *Classes of Development Regulations* should be expanded to include a consideration of a wider range of requirements that includes, but is not limited to:

- Proposed location of the development;
- Environmental sensitivity of the proposed location;
- Uniqueness of the proposed development;
- Potential environmental effects;
- Existence of standard or tested mitigation measures. [p. 59]

4. Environment Act Proposals

4.1 The mandatory requirements for an EAP should reflect a "sliding scale" with a basic level of information for Class 1 developments, an enhanced level of information for Class 2 developments and a comprehensive level of information for Class 3 developments. [p.63]

4.2 Section 1(2) of *The Environment Act* should be revised to include the term "proposal" or "development description" to help identify the difference between an EAP and an environmental assessment report. Such a definition should acknowledge that this type of document should be completed and submitted before the design of the proposed development is finalized and an environmental assessment is undertaken. [p. 63]

4.3 Section 1.1 of the *Licensing Procedures Regulation* should be amended to require that an EAP include an expanded list of requirements such as, but not limited to:

- a list of the licences, certificates, permits, approvals and other forms of authorization that will be required for the proposed undertaking;

- sustainability;
- information about the development's potential effects on Aboriginal communities; and
- a list of the concerns received from the public and Aboriginal communities about the potential effects of the development and the way these concerns will be addressed by the proponent. [p. 64]

4.4 The *Information Bulletin – Preparing an Environment Act Proposal* should be amended or replaced with a guidance document that comprehensively describes the form and nature of the information required for an EAP or a guidance document from another Canadian jurisdiction that can be adopted under s. 43(2) of *The Environment Act*. [p. 64]

5. Review of an Environment Act Proposal

5.1 The Act should be amended to include at the very least, a description of the legal origin of the Technical Advisory Committee, the committee's members, and the roles and duties of the Committee. [p. 66]

5.2 Sections 10(4), 11(8), and 12(4) of Act, or sections 3 to 7 of the *Licensing Procedures Regulation* should be amended to include mandatory timelines for public participation that allows the input of the public to be considered by the department before the level of assessment is determined. [p. 67]

6. Requirements for Further Information

6.1 Section 1(2) of *The Environment Act* should be amended to include a definition for the term "scoping document" or "terms of reference". [p. 71]

6.2 The mandatory requirements for environmental assessment included in *The Environment Act* should reflect a sliding scale with a basic level of assessment and report for Class 1 developments, an enhanced level of assessment and report for Class 2 developments and a comprehensive level of assessment and report for Class 3 developments. [p. 71]

6.3 Sections 10(6), 11(8), and 12(5) of *The Environment Act* should be amended or repealed and replaced with sections that include a mandatory requirement for:

- production of a formal scoping document;
- public review period for all formal scoping documents;
- review of the scoping document by the TAC; and
- review of scoping documents by the CEC. [p. 72]

6.4 *The Environment Act* should be amended to include criteria that must be taken into consideration by the government when determining the level of assessment and finalizing scoping documents. Such criteria should include, but are not limited to:

- comments from the public;
- comments from the TAC, IPB, and other affected government departments;
- comments from the Government of Canada and its agencies (when applicable);
- comments from the municipalities in the vicinity of the undertaking or in which the undertaking is located;
- comments from any affected Aboriginal people or cultural community;
- responses from the proponent. [p. 72]

6.5 The definition for the term "assessment" currently found in section 1(2) of *The Environment Act* should be revised to recognize that an Environmental Act Proposal and an Environmental Assessment Report are two distinct documents. The term "environmental assessment report" should also be added to this section of the Act. [p. 79]

6.6 Sections 10(6), 11(9), and 12(5) of *The Environment Act* should be amended or repealed and replaced with sections that include a mandatory requirement for the production and submission of an environmental assessment report that is separate from an EAP. [p. 79]

6.7 Sections 10(6), 11(9), and 12(5) of *The Environment Act* should be amended or repealed and replaced with sections of the Act or separate Environmental Assessment Regulations, that set out specific requirements for the conduct of an environmental assessment and/or the production of an environmental assessment report. Mandatory considerations should include, but are not limited to:

- Need for the development;
- Consideration of Alternatives;
- Environmental effects;
- Mitigation of adverse effects;
- Follow-up actions;
- Significance of residual environmental effects;
- Cumulative effects;
- Public information gathered during the course of the assessment and how such information has been utilized;
- Aboriginal Traditional Knowledge; and
- Sustainability. [p. 79]

6.8 Guidance should be provided detailing requirements for the conduct of an environmental assessment and the preparation of an environmental assessment report through one or more of the following methods:

- Government prepared guidance document or information bulletin;
- Detailed terms of reference;
- Detailed annotated templates; and
- Adoption of guidance documents, codes of practice, or standards from other Canadian jurisdictions under s. 41(3) of *The Environment Act.* [p. 80]

6.9 Specific project or industry-based guidance documents for the conduct of environmental assessments and the preparation of environmental assessment reports should be developed. [p.80]

7. Decision-making under the Act

7.1 *The Environment Act* should be amended to include decision-making criteria for the following decisions made during the environmental assessment and licensing process:

- Determination of whether a proposed project is a development;
- Level of assessment assigned to a proposed development;
- Scope of any required environmental assessment/environmental assessment reports;
- Approval or denial of a licence; and
- Appeal dismissal or licence variance issued by the Minister and/or Lieutenant Governor-in-Council. [p.83]

7.2 *The Environment Act* should be amended to include provisions that allow proponents and members of the public to acquire reasons for the following decisions made during the environmental assessment and licensing process:

- Determination of whether a proposed project is a development;
- Level of assessment assigned to a proposed development;
- Scope of any required environmental assessment/environmental assessment reports;
- Approval or denial of a licence; and
- Appeal dismissal or licence variance issued by the Minister and/or Lieutenant Governor-in-Council. [p.83]

7.3 Section 17 of the Act should be amended to require the inclusion of any requested reasons for decision in public registry files. [p.83]

8. Appeals

8.1 Sections 27 and 28 of *The Environment Act* should be amended to allow for review of licensing decisions by an independent body such as an ad hoc review panel or the Clean

Environment Commission. Such review should result in recommendations to be submitted in writing and considered by the appropriate decision-making authority. [p. 86]

8.2 *The Environment Act* should be amended to include legislated timelines for the review of appeal documents, and final appeal decisions. [p. 86]

8.3 *The Environment Act* should be amended to include a provision that allows members of the public to acquire reasons for appeal decisions made by the Minister and the Lieutenant Governor-in-Council. [p. 86]

8.4 Section 17 of the Act should be amended to require the inclusion of appeal documents in public registry files. Such documents should include, but are not limited to:

- Appeal applications;
- Appeal decision; and
- Reasons for appeal decisions. [p. 86]

9. Post-licensing Requirements

9.1 Sections 10, 11, and 12 should be amended or replaced with provisions that set out mandatory post-licensing requirements for licensed developments such as, but not limited to:

- Monitoring plans;
- Environmental management and protection plans;
- Auditing requirements and timelines; and
- Program evaluation requirements and timelines.

Such requirements should be required to be discussed by the proponent in a proposed project's EAP and EAR. [p.93]

9.2 The Act should be amended to expressly provide the Minister with the power to audit a proponent's post-licensing activities after a licence is issued. The Act should also be amended to empower the Director or Minister to periodically review licences and licensing conditions and require amendments if necessary. [p.93]

9.3 The Act should be amended to include a broader range of enforcement provisions including, but not limited to:

- Penalties for knowingly providing false information;
- Administrative penalties;
- Injunctions and "stop work" orders. [p.93]

9.4 The Act should be amended to require regular formal review of the environmental assessment and licensing system in Manitoba. [p.93]

9.5 Section 17 of the Act should be amended to require the inclusion of post-licensing monitoring, auditing, enforcement, and review information produced by both the proponent and government in public registry files. This requirement should be made subject to provisions for the protection of proprietary or other confidential information. [p.93]

10. Strategic Environmental Assessment

10.1 *The Environment Act* should be amended to include a legislative provision that grants the Minister discretionary power to require SEA/RSEA and the mandatory participation of appropriate parties in such undertakings. [p.95]

10.2 *The Environment Act* should be amended to include a provision that requires the results of any relevant SEA and/or RSEA be discussed in a development's EAP and Environmental Assessment Report, as applicable. [p.95]

11. Consideration of Alternatives

11.1 *The Environment Act* should be amended to include a legislative provision that grants the Minister discretionary power to require a proponent to undertake a NFAT analysis at the project and/or strategic level. [p.98]

11.2 *The Environment Act* should be amended to include a legislative provision that requires the results of any relevant NFAT analysis to be discussed in a development's EAP and Environmental Assessment Report, as applicable. [p.98]

12. Cumulative Effects Assessment

12.1 *The Environment Act* should be amended to include a legislative provision that grants the Minister discretionary power to require a proponent to undertake a CEA at the project and/or strategic level. [p.99]

12.2 *The Environment Act* should be amended to include a legislative provision that requires the results of any relevant CEA to be discussed in a development's EAP and Environmental Assessment Report, as applicable. [p.99]

12.3 The Government of Manitoba should develop and produce guidance materials, in partnership with the public, proponents, and practitioners, that provide assistance with undertaking and reporting the results of CEA in Manitoba. [p.99]

13. Significance

13.1 Guidance material should be developed by the Government of Manitoba, in partnership with the public, proponents, legal practitioners and Aboriginal communities, to assist with the determination of significance in Manitoba's environmental assessment process. [p.101]

14. Existing Developments

14.1 Section 1(1) of the Act should be amended to include a definition for the term "existing development". [p.102]

14.2 *The Environment Act* should be amended to include decision-making criteria for when an existing development is considered for possible review under sections 10(2), 11(6) or 12(2). [p.102]

14.3 *The Environment Act* should be amended to include provisions that allow proponents and members of the public to obtain reasons for a decision made by the Minister to require an existing development to undergo the environmental assessment process. [p.103]

15. Staged Licensing and Project Splitting

15.1 Sections 13(1) to 13(3) of *The Environment Act* should be repealed. [p.104]

15.2 The Environment Act should be amended to include a legislative mechanism that grants the Minister discretionary power to require the combined assessment of developments which have been split or licensed in stages. [p.104]

16. Alterations and Review of Licences

16.1 *The Environment Act* should be amended to include a legislative mechanism that requires Environment Act licences to have a fixed licence term and expiration date. [p.105]

16.2 *The Environment Act* should be amended to include a legislative mechanism that gives the Director/Minister discretionary power to require the review of already licensed developments if there is risk of new or previously unrecognized adverse environmental effects. [p.105]

16.3 Section 14 of the Act should be amended to incorporate decision-making criteria and corresponding regulations and/or guidance materials should be developed that outline the procedure and criteria for determining if an alteration is "minor alteration" or "major alteration". [p.105]

16.4 Section 17 of *The Environment Act* should be amended to include a mandatory requirement that all versions of a development's licence are available in the public registry, not just the most current version. [p.105]

This is a report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 14th day of May, 2015.

"Original Signed by"
Cameron Harvey, President

"Original Signed by"
Jacqueline Collins, Commissioner

"Original Signed by"
Michelle Gallant, Commissioner

"Original Signed by"
John C. Irvine, Commissioner

"Original Signed by"
Gerald O. Jewers, Commissioner

"Original Signed by"
Myrna Phillips, Commissioner

"Original Signed by"
Perry W. Schulman, Commissioner

ENDNOTES:

CHAPTER 1: INTRODUCTION

[1] Christopher Wood, *Environmental Impact Assessment- A Comparative Review*, 2nd ed (Harlow: Pearson Education Limited, 2003), at 1.

[2] Wood, *Ibid*, at 5.

[3] See Chapter 2 of this Report.

[4] Department of Mines, Resources and Environmental Management, *An Environmental Assessment and Review Process for Proposed Provincial Projects* (July 1976), cited in Robert T. Franson and Alastair R. Lucas, *Canadian Environmental Law*, 1976: Butterworths, Toronto and Vancouver, Issue 61, Vol. 3, at. 1401-1410.

[5] Manitoba, *The Environment Act*, 1988, C.C.S.M, c. E125.

[6] Canada, *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.

[7] See Robert Gibson, "In Full Retreat: the Canadian Government's New Environmental Assessment Law Undoes Decades of Progress" (2012) 30:3 *Impact Assessment and Project Appraisal* at 179; Meinhard Doelle, "CEAA 2012: The End of Federal EA as We Know It?" (2012) 24 *JELP* 1.

[8] Manitoba Conservation and Water Stewardship, *Report of the Consultation on Sustainable Development Implementation (COSDI)*, (June 1999), online: Province of Manitoba http://www.gov.mb.ca/conservation/susresmb/cosdireport.html [COSDI].

[9] Manitoba Conservation, *Building a Sustainable Future: Proposed Changes to Manitoba's Environment Act A Discussion Paper* (September 18, 2001).

[10] The Commission has also referred to the recent work of Mark Haddock, *Environmental Assessment in British Columbia* for the Environmental Law Centre, University of Victoria, Faculty of Law (November 2010); Deborah Carver et al, *Inter-jurisdictional Coordination of EA: Challenges and Opportunities Arising from Differences Among Provincial and Territorial Assessment Requirements and Processes* for the Environmental Planning and Assessment Caucus, Canadian Environmental Network & the East Coast Environmental Law Association (November 2010); Brenda Heelan Powell, *A Model Environmental and Sustainability Assessment Law* (Edmonton: Environmental Law Centre, 2013).

[11] For example, Canadian Environmental Assessment Agency & International Association for Impact Assessment, *Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance - International Study of the Effectiveness of Environmental Assessment*, Final Report by Barry Sadler (Supply and Services Canada, 1996) [Sadler].

[12] *Ibid*, Sadler at 37

[13] Wood, *supra* note 1, at 5.

[14] In the context of this Report, the term "policy instruments" refers primarily to published guidelines issued by the Manitoba Department of Conservation and Water Stewardship.

CHAPTER 2: HISTORY

[15] Government of Manitoba, *Overviews: Natural Resources* (online: accessed October 6, 2014) http://www.gov.mb.ca/jec/invest/busfacts/overviews/natres.html; John Welsted, *The Geography of Manitoba: Its Land and its People*, (1996: The University of Manitoba Press), at 195-196.

[16] Krzic M., et al., 2010. *Soil Formation and Parent Material*. (2010: The University of British Columbia; Thompson Rivers University; Agri-Food Canada) online: http://soilweb.landfood.ubc.ca/landscape/parent-material/water-environment/alluvial-environment.

[17] Much of this discussion would not have been possible without the work of Dr. Jim Mochoruk, Dr. Frank Tough, and distinguished historian W.L. Morton.

[18] Royal Commission on Aboriginal Peoples, *People to people, nation to nation: Highlights from the report of the Royal Commission on Aboriginal Peoples*, (1996: Government of Canada), online: http://www.aadnc-aandc.gc.ca/eng/1100100014597/1100100014637.

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[19] Dr. Linc Kesler, *Aboriginal Identity & Terminology*, (2009: First Nations Studies Program, University of British Columbia), online: http://indigenousfoundations.arts.ubc.ca/home/identity/Aboriginal-identity-terminology.html.

[20] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 35 [the Constitution].

[21] Some suggested sources that discuss incorporating and utilizing the Aboriginal perspective in education, history, and legal interpretations include: Aimée Craft, *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One*, (2013:Purich Publishing Ltd.); Taiaiake Alfred, *Aboriginal Perspectives: Canadian Colonialism*, online: http://www3.nfb.ca/enclasse/doclens/visau/index.php?mode=theme&language=english&theme=30662&film=16933&excerpt=612357&submode=about&expmode=1; Tony Oliver, *A Brief History of Effects of Colonialism on First Nations in Canada*, (2010: Manitoba Wildlands), online: http://manitobawildlands.org/pdfs/TonyOliver-BriefHistory_2010.pdf; Manitoba, *Integrating Aboriginal Perspectives into Cirricula: A Resource for Cirriculum Developers, Teachers, and Administrators*, 2003, online: http://www.edu.gov.mb.ca/k12/docs/policy/abpersp/ab_persp.pdf ; Kelly J. Lendsay and Wanda Wuttunee, *Historical Economic Perspectives of Aboriginal Peoples: Cycles of Balance and Partnership*, online: http://iportal.usask.ca/docs/Journal%20of%20Aboriginal%20Economic%20Development/JAED_v1no1/JAED_v1no1_Article_pg87-101.pdf.

[22] As stated by the Aboriginal Justice Inquiry of Manitoba, "It is incumbent upon all Manitobans to ensure that the errors of their ancestors are corrected and that the history of their fellow citizens of Aboriginal descent is better understood so Aboriginal people are able to occupy a position in society which recognizes their contribution to the development of our community." [The Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People*, Chapter 3: *A Historical Overview*, online: http://www.ajic.mb.ca/volumel/chapter1.html]

[23] James B. Waldram, *As Long as the Rivers Run: Hydroelectric Development and Native Communities in Western Canada*, (1988: The University of Manitoba Press), at 5.

[24] For more information, suggested sources include: Waldram, *Ibid*; Frank J. Tough, "The Forgotten Constitution: The Natural Resources Transfer Agreements and Indian Livelihood Rights, Ca. 1925-1933" (2004) *Alberta Law Review* 41:4; Jim Mochoruk, *Formidable Heritage: Manitoba's North and the Cost of Development, 1870-1930*, (2004: University of Manitoba Press); Frank Tough, *As Their Natural Resources Fail: Native Peoples and the Economic History of Northern Manitoba, 1870-1930*, (1996: UBC Press); Indian and Northern Affairs Canada, *Indian Treaties in Manitoba*, (2000: Government of Canada); Indian and Northern Affairs Canada, *Treaties in Manitoba*, (2010: Government of Canada).

[25] Halsbury's Laws of Canada, Environment, I.1.Hen-1.

[26] Halsbury's Laws of Canada, III. Regulation of the environment in Canada, 9. Natural Resources, forests and wildlife, (1) overview Hen-223.

B. Jurisdiction over Manitoba's Natural Resources 1870-1930

[27] For example, control of natural resources allows for the establishment of new industries within the jurisdiction; creates the ability to prevent export of raw materials; and provides a means to encourage immigration and development of industry by enabling the authority to grant land to newcomers. (See - Gerard V. La Forest, *Natural Resources and Public Property under the Canadian Constitution*, (1969: University of Toronto Press) at. xii-xiii).

[28] La Forest, *Ibid.*

[29] Chester Martin, *The Natural Resource Question: The Historical Basis of Provincial Claims*, (1920: Saults and pollard Ltd.).

Note: The term 'Natural Resources' was used to describe all Crown lands, mines and minerals within a territory, including all associated royalties [as discussed in - Canada, *Report of the Royal Commission on the Transfer of The Natural Resources of Manitoba*, (1929: the Kings Printer), at 9].

[30] *The Manitoba Act*, 1870, 33 Victoriae, c. 3. Reprinted in Appendix II – W.L. Morton, eds., *Manitoba: The Birth of a Province*, at 251.

[31] This money was withheld by Sir John Macdonald's Dominion government in response to the 'Red River Resistance' led by Louis Riel. Macdonald refused to take possession of the new territory until the Imperial

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government restored order to the area by shutting down the Resistance [W.L. Morton, eds., *Manitoba: The Birth of a Province*, (1965: Manitoba Record Society Publications), at 67].

See also Chester Martin, Thomas Martin, eds., *Dominion Lands Policy*, (1973: The Canadian Publishers), at 5 – "The Riel Insurrection which delayed that transaction from December 1, 1969 to July 15, 1870, was technically a revolt against the Hudson's Bay Company."

[32] J.E. Rea, *Manitoba Act*, (2006: The Canadian Encyclopedia), online: http://www.thecanadianencyclopedia.com/en/article/manitoba-act/; Report of Royal Commission, *supra* note 27, at 22 ["8913920 acres"].

[33] La Forest, *supra* note 27, at xi.

[34] Jim Mochoruk, "Manitoba and the (Long and Winding) Road to the Natural Resources Transfer Agreement", (2007) *Review of Constitutional Studies* 12:1, at 256 [Mochoruk, 2007].

[35] Morton, *supra* note 31, at 257.

[36] Martin, *supra* note 29, at 6;

Lands were to be given to intending settlers in return for the payment of a small fee and the performance of settlement duties like building a residence and cultivating a certain area annually [T.D. Regehr, *Dominion Lands Policy*, (2006: The Canadian Encyclopedia), online: http://www.thecanadianencyclopedia.ca/en/article/dominion-lands-policy/];

This policy included stimulating large-scale immigration to the West, fostering the rapid development of "communications to the Pacific" and the use of former HBC lands to recoup the purchase price of £300,000. [Mochoruk, 2007, *supra* note 34, at 259].

[37] Chester Martin, *supra* note 29, at 45, 50:"The animosities of the Riel Insurrection and the motives under which provincial status was sought and secured in the *Manitoba Act* long inspired an unenviable and rather undiscriminating prejudice against this province".

[38] Mochoruk, 2007, *supra* note 34, at 257-259. See also: Morton, *supra* note 31, at. 6-7.

[39] Mochoruk, 2007, *Ibid*, at 260: "Politicians and other advocates for Manitoba who, in other regards, completely disavowed the legacy of Riel, often found themselves recasting his demands in more contemporary terms".

See also Chester Martin's *The natural Resource Question, supra* note 27.

[40] Mochoruk, 2007, *Ibid.*

[41] 44 Vict., c. 14 (Can.), s. 2.

[42] Geo. 5. C. 32(Can.). s. 6 – this expanded the provincial borders to their present day area.

[43] For a discussion of the financial arrangements between the Dominion and the province see: Report of the Royal Commission, *supra* note 29, at 24-27.

[44] La Forest, *supra* note 27, at 30.

[45] La Forest, *Ibid*, at 31.

[46] It is possible that an argument could have been made in Manitoba that precious metals were under the provincial government's jurisdiction before 1930. However, this issue was never dealt with by the Manitoba Courts. See La Forest, *Ibid*, at 30; *Johnny Walker Case (Re)*, [1889] J.C.J. No. 1, 14 App. Cas. 295; and *Kennedy v. Inman* [1920], A.J. No. 93, 51 D.L.R. 155.

[47] La Forest, *supra* note 27, at 31; See also: William P. Elliott, *Artificial Land Drainage in Manitoba: History – Administration – Law*, (1978: The Natural Resource Institute) for a discussion of swamp land drainage for settlement and agricultural purposes.

[48] Report of the Royal Commission, *supra* note 29, at 28-29.

[49] Report of the Royal Commission, *Ibid*, at 29.

[50] *The Manitoba Natural Resources Act*, S.M. 1930, c. 30.

[51] Frank J. Tough, "The Forgotten Constitution: The Natural Resources Transfer Agreements and Indian Livelihood Rights, Ca. 1925-1933" (2004) *Alberta Law Review* 41:4, at 1007 [Tough, 2004]. The compensation cheque that Manitoba received as a consequence of the NRTA was for $4,584,212.49 (at 1018).

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[52] Mochoruk, 2007, *supra* note 34, at 256.

[53] Mochoruk, 2007, *Ibid.*

C. Condition of Manitoba's Natural Resources: 1930

[54] One exception is *The Mines Act* of 1897 and The *Mining Companies Act* 1897 [see footnote 116]; the provincial government also introduced its first pollution legislation in 1871 as a response to agricultural, mining and forestry industries causing pollution of provincial waters – this will be discussed more below.

[55] Jim Mochoruk, *Formidable Heritage: Manitoba's North and the Cost of Development, 1870-1930*, (2004: University of Manitoba Press), at 363 [Mochoruk, 2004]. "Manitoba might actually have been better off, at least in the short term, if it had not received beneficial control over its own resources in 1930."

Mochoruk suggests that Manitoba may have been better off financially if the provincial government waited until the 1940s to gain control of the province's natural resources since it was not until this time that the provincial government was able to begin financially benefiting from the existing natural resource based industries in the province. This was in large part due to the pre-existing legal regime put in place by the Dominion government and the monopolistic control some companies had in the forestry and mining industries.

[56] Mochoruk, 2004, *Ibid*, at 355.

[57] For extensive discussion of the political atmosphere surrounding the issue of natural resource control see: Mochoruk, 2007, *supra* note 34; Tough, 2004, *supra* note 51; Mochoruk, 2004, *supra* note 55; Martin, *supra* note 27; and Report of the Royal Commission, *supra* note 29. See also Michael Tanner, 'The Evolution of Environmental Management in Canada', 1997 *The London Journal of Canadian Studies* Vol. 13.

[58] R.C. Wallace, "Mining Development in Northern Manitoba", (1919) *The Transactions of the Canadian Mining Institute*, Volume 22, at 330; E.L. Bruce, "Mining in Northern Manitoba", (1918) *The Transactions of the Canadian Mining Institute*, Volume 21, at 280.

[59] Wallace, *Ibid*, at 334-339.

[60] Mochoruk, 2004, *supra* note 55, at 354. See also - George E. Cole, *Mining in Manitoba*, (1948-49: Manitoba Historical Society Transactions) online: http://www.mhs.mb.ca/docs/transactions/3/manitobamining.shtml.

[61] Mochoruk, 2004, *Ibid*, at 361.

[62] See *An Act to Provide Compensation for Damage Caused by Mining, Smelting and Refining Operations*, M.S., 1928, c. 7; Mochoruk, 2004, *Ibid*, at 362 [citing PAM. MG13 I2, Bracken Papers, Box 19, #224, "J.W. Martin, Acting Commissioner of Dominion Lands to R.C. Wallace, Commissioner of Mines, August 25, 1928" and "J.S. DeLury, Commissioner of Mines to Premier John Bracken, September 14, 1928"]. See also p. 361, note 76 in Morchoruk, 2004.
Note: Similar legislation remains in force today as *The Mining and Metallurgy Compensation Act*, C.C.S.M. 1987, c. M190 and allows for similar legal exemptions for mining operations that take place within the mining districts set out in the Schedule to the Act.

[63] Mochoruk, 2004, *supra* note 55, at 362.

[64] *Ibid*, at 356.

[65] Historic Resources Branch, *The Lumber Industry in Manitoba*, (2000: Government of Manitoba), at 5, online: http://www.gov.mb.ca/chc/hrb/pdf/lumber_industry_in_manitoba.pdf ["The Lumber Industry"].

[66] The Lumber Industry, *Ibid*, at 5.

[67] The Lumber Industry, *Ibid*, at 6.

[68] Mochoruk, 2004, supra note 55, at 353-354, 358.
[69] Mochoruk, 2004, *Ibid*, at 353: This equates to 457, 200, 000 metres of saw lumber; 3, 657, 600 linear metres of building logs.

[70] The Lumber Industry, *Supra* note 65, at 5.

[71] Morchoruk, 2004, *supra* note 55, at 358.

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[72] Mochoruk, 2004, *Ibid*, at 359. "[F]rom the time that cutting operations began in 1926 until 1934, a total of only 196 cords of dues-payable wood was used by [Manitoba Paper], thereby depriving first the Dominion and then Manitoba of any substantial revenues."

[73] Frank Tough, *As Their Natural Resources Fail: Native Peoples and the Economic History of Northern Manitoba, 1870-1930*, (1996: UBC Press), at 177 [Tough, 1996].

[74] Tough, 1996, *Ibid*, (citing Canada, Canadian Sessional Papers, 1889, Annual Report for the Department of Marine and Fisheries, no.8, at 221).

[75] Frank J. Tough, *Case Study 18.1: Fish on the Prairies? A Colonial Resource Economy* – in Welsted, *Supra* note 15, at 281.

[76] Before 1930 there had already been two major government investigations into Manitoba's fishing industry after reports of over fishing and population decline - 1890 and 1909 - but the government refused to alter the structure of the industry. (Tough, *Ibid*, at 281-282). There was also little enforcement of the few legal restrictions that did exist.

[77] Morchoruk, 2004, *supra* note 55, at 354.

[78] Morchoruk, 2004, *Ibid*, at 356.

[79] Mochoruk, 2004, *Ibid*.

[80] Tough (in Welsted), *Supra* note 15, at 271.

[81] The Minnedosa River Plant was built on the Minnedosa (now Little Saskatchewan) River by the Brandon Electric Light Company Ltd. and served the City of Brandon when it was in operation for eight months of the year. See Manitoba Hydro, *History & Timeline*, online: https://www.hydro.mb.ca/corporate/history/hep_1900.html.

[82] Manitoba Hydro, *Ibid* - This station was located on the Pinawa Channel of the Winnipeg River and was built by WERCo. The system reached full operation capacity by 1912.

[83] This generating station was built by City Hydro and is the oldest power plant still in operation on the Winnipeg River. The project was granted a Licence under the *Dominion Water Power Act* in 1911 for a term of twenty years. Four Licence renewals have been issued since this time: 1) 1932-1951; 2) 1952-1971; 3) 1972-1991; 4) 1992-2011. The 4th renewal licence is available at
http://www.gov.mb.ca/waterstewardship/licensing/pdf/pointe_du_bois/pointe_du_bois_fourth_renewal_1992.pdf.

The Generating Station is currently operating under a Short-Term extension Licence (2012-2017) – available from http://www.gov.mb.ca/waterstewardship/licensing/pdf/pdub_stel.pdf . A renewal project was licensed under *The Environment Act* in 2012 (Licence No. 2988R) -
http://www.gov.mb.ca/conservation/eal/archive/2012/licences/2988r.pdf.

[84] This Generating Station was constructed in two stages between 1914 and 1928. The Project operated under a Water Power Act Licence from 1932-1981 and was granted a licence renewal in 1999 (1982-2032): See
http://www.gov.mb.ca/waterstewardship/licensing/pdf/great_falls/great_falls.pdf.

[85] McInnes, W. *The Basins of the Nelson and Churchill Rivers*, (1913: Canada Department of Mines), Geological Survey Memoir No. 30, Ottawa On. as cited in: Manitoba Hydro, *Regional Cumulative Effects Assessment for Hydroelectric Developments on the Churchill, Burntwood and Nelson River Systems: Phase I Report*, 2014, at 2-3, online: https://www.hydro.mb.ca/regulatory_affairs/rcea/pdf/part123_rcea_phase1.pdf.

[86] Karen Nicholson, *A History of Manitoba's Commercial Fishery: 1872-2005*, (2007: Historic Resources Branch) at 4, 141, online: http://www.gov.mb.ca/chc/hrb/internal_reports/pdfs/Fishery_MB_Commercial.pdf.

[87] The Seven Sisters Generating Station was built in two stages. The first stage was completed in 1931. The project was granted an Interim Licence under the *Dominion Water Power Act* and Regulations in 1928 and in 1930 the administration of the licence transferred to the provincial government following the NRTA. The Project's Final Licence valid from 1932 to 1982 under *The Water Power Act (*last revised in 1966) is available online at:
http://www.gov.mb.ca/waterstewardship/licensing/pdf/seven_sisters/seven_sisters_final.pdf . A Short-term Extension Licence was granted to Manitoba Hydro in 1982 and is in effect until 2015 - available online at:
http://www.gov.mb.ca/waterstewardship/licensing/pdf/seven_sisters/seven_sisters_stel.pdf.

[88] See Welsted, *supra* note 15: John Everitt, *The Development of the Grain Trade in Manitoba*, at 197-218; William Carlyle, *Agriculture in Manitoba*, at 219-236.

[89] Welsted, *Ibid*, at 197.

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[90] Elliot, *supra* note 47, at 6.

[91] Elliot, *Ibid.*

[92] The Lumber Industry, *Supra* note 65, at 5.

[93] While the economy of Manitoba was been dominated by the production of wheat, other grain crops such as barley, oats, and rye were important too (William Carlyle, *Agriculture in Manitoba* – cited in Elliot, *supra* note 47, at 219), see also p. 228-229.

[94] SM 1880, c. 2. See also: *The Land Drainage Act* 1895 SM 1985, c. 11; *The Land Drainage Arrangement Act* 1935 SM 1935, c. 133. These drainage practices resulted in widespread environmental destruction in Manitoba.

[95] See *An Act to Prevent the Deposit of Manure on Banks of Rivers and Streams,* S.M. 1871, c. 28.

[96] Mochoruk, 2004, *supra* note 55, at 363.

D. The Expansion of Provincial Regulation: 1930

[97] *An Act to Create a Department of Mines and Natural Resources,* S.M. 1929, c. 42. At the time the Act was created the new department took over the administration of *The Mines Act* (s. 6). This Department underwent several name changes before ultimately being replaced by the Department of Conservation in 1999. These name changes are as follows: Department of Mines and Natural Resources (1928-1970); Department of Mines, Resources and Environmental Management (1971-1975); Department of Renewable Resources and Transportation Services (1976-1977); Department of Mines, Natural Resources and Environment (1978); Department of Natural Resources (1979-1999); Department of Conservation (1999-2008). See also Department of Water Stewardship (2003-2012); Department of Conservation and Water Stewardship (2012-Present).

[98] *An Act respecting Crown Timber and Forest Reserves ("The Forest Act"),* S.M 1930, c. 14.

[99] "Timber berth" means any area leased for the cutting and removal of Crown timber for any purpose, granted under this Act. [S.M. 1930, c. 14, s. 2(i)].

[100] S.M. 1930, c. 14, s.9.

[101] S.M. 1930, c. 14, s.11.

[102] S.M. 1930, c. 14, s.12.

[103] The Lumber Industry, *supra* note 65, at 5.

[104] S.M. 1930, c. 14, s.32.

[105] S.M. 1930, c. 14, s. 40.

[106] The Lumber Industry, *Supra* note 65, at 7. See also UNESCO, *National Parks Act (1930)*, online: http://www.unesco.org/culture/natlaws/media/pdf/canada/canada_act_1930_eng_orof.pdf.

[107] *An Act Respecting Water Rights*, R.S.M 1930, c. 47.

[108] *An Act Respecting Provincial Water Powers*, R.S.M. 1930, c.46.

[109] Red River Basin Board, *Water Law*, 2000, at 1, 29, online: http://www.redriverbasincommission.org/WaterLawFinal.PDF.

[110] R.S.M. 1930, c.46, s. 10(1).

[111] R.S.M. 1930, c.46, s. 24-27.

[112] R.S.M. 1930, c.46, s. 28-32.

[113] R.S.M. 1930, c.46, s. 43-47.

[114] R.S.M. 1930, c.46, s. 5.

[115] Red River Basin Board, *Supra* note 109, at 29.

[116] When *The Mines Act* S.M. 1897, c. 17 was first enacted, it provided a legal framework for the construction and operation of mines, exploration and staking of Crown lands, and land rentals. This legislation was only applicable to lands under control of the provincial government. See *Winnipeg Free Press*, February 25, 1987, at 3.

The Mining Companies Act S.M. 1897, c. 18 regulated the incorporation of mining companies and the sale of stocks and shares.

[117] *The Mines Act*, S.M. 1930, c. 27.

[118] *The Mines Act*, S.M. 1930, c. 27, s. 4.

E. Protection of the Environment – Early Pollution Control Legislation

[119] *An Act to Prevent the Deposit of Manure on Banks of Rivers and Streams*, S.M. 1871, c. 28; This Act was later renamed *An Act to Prevent the Pollution of Rivers and Streams* C.S.M., 1880, c. 21 and then *An Act Respecting Pollution of Rivers and Streams* ("The Pollution of Streams Act") R.S.M. 1891, c. 118.

[120] Jill S. Vaisey, *Water Quality Policy Manitoba: History – Administration – Implementation, A Practicum submitted in Partial Fulfillment of the Requirement for the Degree, Master of Natural Resource Management*, (January 1979), Natural Resource Institute, The University of Manitoba., at 20.

[121] S.M. 1871, c. 28, s. 1.

[122] *Ibid*, s. 2.

[123] *An Act for Protecting the Public Interest in Rivers, Streams and Creeks*, S.M 1905, c. 43.

[124] *Ibid*, s. 1.

[125] R.S.M. 1913, c. 173.

[126] *Ibid*, s. 2-6.

[127] *Ibid*, s. 7-19.

[128] *Ibid*, s. 20-24.

[129] *Ibid*, s. 20-22: protection was provided for firewood; property, goods or chattel negligently set on fire by sparks from steamboats; and the ropes of ferries.

[130] S.M. 1935, c. 34.

[131] Vaisey, *Supra* note 120, at 23.

[132] S.M. 1935, c. 34, s. 51. *The Rivers and Streams Act* retained the provisions concerning the right to float materials along the water courses, prohibitions about obstructing watercourses, conditions affecting improvements made to water courses, and provisions concerning steamboats and ferries.

[133] S.M. 1935, c. 34, Part II, s. 8-21.

[134] S.M. 1935, c. 34, s. 13.

[135] S.M. 1935, c. 34, s. 15.

[136] See Part III, S.M. 1935, c. 34. See also *The Greater Winnipeg Sanitary District Act* S.M. 1935, c. 80:
The intent of this Act was to control water pollution in the city, resulting from the discharge of sewage and water. Increases in population and in industrial activity, combined with the low water flows during the early 1930s created a situation where the flow of sewage was almost equal to the flow of the Red River. [Vaisey, *supra* note 120, at 24, citing - The Winnipeg Free Press, September 13, 1971, at 1].

[137] Manitoba, Legislative Assembly, *Official Report of Debates and Proceedings (Hansard)*, 28th Leg., 2nd Sess., (May 21, 1968) at 2237 (Hon. Charles H. Witney): "The tailings in the Thompson area are being controlled as a result of the terms and the licensing that was brought about by the *Water Pollution Act*. Major sewage outlets in the metropolitan area are now being gradually contained."
See also Manitoba, Legislative Assembly, *Official Report of Debates and Proceedings (Hansard)*, 28th Leg., 2nd Sess., (May 13, 1968) at 1944 (Hon. Charles H. Witney).

F. The Clean Environment Act: 1968-1988

[138] Tanner, *supra* note 57, at 8.

[139] Hansard, *Supra* note 137, at 1944 (Hon. Charles H. Witney).

[140] *Ibid*, at 1945 (Hon. Charles H. Witney).

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[141] S.M. 1968, c. 7.

[142] Vaisey, *Supra* note 118, at 26.

[143] S.M. 1968, c. 7, s. 2(1), 3(1), 4(1).

[144] Hansard, *supra* note 137, at 1944 (Hon. Charles H. Witney).

[145] S.M. 1968, c. 7, s.8(1), 8(4), 11.

[146] Hansard, 2nd Sess, 28th Leg., May 13, 1968, at 1944 (Hon. Charles H. Witney) "All municipalities, industries or other bodies doing anything that could in any way affect the environment were required under this legislation to apply to the Commission for a licence to undertake that activity. This licence could be granted entirely, granted conditionally, or refused."

[147] During the Sanitary Commission's thirty-three years of operation, it issued 150 licences to limit individual sources of water pollution. [Clean Environment Commission, *Annual Report 2010-2011*, at 8].

[148] S.M. 1968, c. 7, s. 8(1), 8(4), 11, 13(1).

[149] S.M. 1968, c. 7, s. 12.

[150] S.M. 1968, c. 7, s. 15.

[151] S.M. 1968, c. 7, s. 13(1).

[152] S.M. 1968, c. 7, s. 14.

[153] S.M. 1968, c. 7, s. 13(3).

[154] S.M. 1968, c. 7, s. 13(6).

[155] S.M. 1968, c. 7, s. 16.

[156] S.M. 1968, c. 7, s. 18.

[157] S.M. 1968, c. 7, s. 18(5).

[158] S.M. 1968, c. 7, s. 2(2), 3(2), 4(2).

[159] Hansard, 2nd Sess, 28th Leg., May 21, 1968, at 2236 (Hon. Mr. Green).

[160] S.M. 1968, c. 7, s.5.

[161] *Supra* note 159.

[162] *An Act to Amend the Clean Environment Act*, S.M. 1970, c. 62.

[163] S. M. 1971, c. 82, s. 10.

[164] S.M. 1970, c. 62, s.2-4 – See R.S.M. 1970, c. C130.

[165] S.M. 1970, c. 62, s.7, see also s. 1.

[166] S.M. 1970, c. 62, s.7, see new s. 13(4).

[167] S.M. 1970, c. 62, s.7, see new s. 13(7).

[168] S.M. 1970, c. 62, s.7, see new s. 14(1), 14(3), 14(4).

[169] S. M. 1971, c. 82, s. 10.

[170] *The Clean Environment Act*, S.M. 1972, c. 76. Section 24 of this new Act repealed R.S.M. 1970, c. C130; S.M. 1970, c. 62; S. M. 1971, c. 82, s. 10.

[171] S.M. 1972, c. 76, s. 3-5.

[172] The owner of the hog farm was later sued in nuisance by his neighbours and the Court found that the odors from the hog farm invaded the neighbour's enjoyment of their home and land beyond tolerable levels. The neighbours were awarded $10,000 in damages. [*Lisoway v. Springfield Hog Ranch Ltd.* [1975] M.J. No. 188]. Very shortly after this decision, *The Nuisance Act* S.M. 1976, c. 53 was enacted to prevent "judicial interference" like the decision in *Lisoway* in a situation where a farmer "is not doing anything wrong" and "is not disobeying any laws". [Manitoba, Legislative Assembly, *Official Report of Debates and Proceedings (Hansard)*, 30th Leg., 3rd Sess., (May 31, 1976) at 4458-4459 (Hon. … Green)]. See also para 29-33 of *Lisoway*; and Manitoba Law Reform Commission, *The Nuisance Act and The Farm Practices Protection Act*, 2013, at 11-12.

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[173] S.M. 1972, c. 76, s. 13(1).

[174] S.M. 1972, c. 76, s. 2(1).

[175] S.M. 1972, c. 76, s. 2(3).

[176] S.M. 1972, c. 76, s. 14(4). Section 14(1) required individuals who wished to construct premises or alter same or set into operation any industry, undertaking, plant, or process that could result in the discharge or emission of any contaminant into the environment to submit a proposal to the CEC who could then "approve" such a proposal if it met the limits set out in the regulations. There is no mention of the word "licence" in any part of *CEA, 1972* except s. 6(1) which discussed licences issued under *CEA, 1968*.

[177] S.M. 1972, c. 76, s. 14(10).

[178] S.M. 1972, c. 76, s. 17(2), 17(3). Note that this is what happened with the order made by the CEC in *Lisoway, supra* note 172.

[179] S.M. 1972, c. 76, s. 17(1), 17(3).

[180] S.M. 1972, c. 76, s. 12(1).

[181] See Manitoba, Legislative Assembly, *Official Report of Debates and Proceedings (Hansard)*, 29th Leg., 4nd Sess., (June 19, 1972) at 3595 (Hon. Mr. Evans); July 3, 1972 at 3723 (Hon. Mr. Allard); July 6, 1972 at 3893 (Hon. Mr. Girard).

[182] See S.M. 1974, c. 41; S.M. 1975, c.42, s. 11; S.M. 1976, c. 17; S.M. 1977. C. 57, s. 4; S.M. 1978, c. 17; S.M. 1980, c. 59; S.M. 1984, c. 11.

[183] S.M. 1974, c. 41, s.1, s.3, s.7.

[184] S.M. 1974, c. 41, s.2.

[185] S.M. 1974, c. 41, s.3.

[186] S.M. 1974, c. 41, s.4.

[187] S.M. 1978, c. 17, s. 4.

[188] S.M. 1978, c. 17, s. 4.

[189] S.M. 1980, c. 59, s.2, s. 10.

[190] S.M. 1984, c. 11, s. 10.

[191] Suzanne Richards and Lorna Hendrickson, *Guide to Federal and Provincial Pollution Control Legislation in Manitoba*, (1986: Environment Canada; Manitoba Environment and Workplace Safety and Health), at 7-8. See M.R. 34/73; M.R. 334/74; M.R. 120/75; M.R. 18/76; M.R. 208/76; M.R. 140/77; M.R. 112/80; M.R. 156/80; M.R. 165/80; M.R. 15/81; M.R. 85/81; M.R. 124/84; M.R. 98/85.

[192] Kenton Lobe, *Environmental Assessment: Manitoba Approaches*, Chapter 16 (at 293-294) in Kevin S. Hanna, eds. *Environmental Impact Assessment: Practice and Participation*, (2005: Oxford University Press).

[193] For a description of the consolidated requirements under *CEA, 1972* in 1986 see: Richards and Hendrickson, *supra* note 191, at 6-8.

G. Environmental Assessment

[194] NEPA, 42 U.S.C. §§ 4321-4347; Linda Luther, *The National Environmental Policy Act: Background and Implementation*, (2005: Library of Congress), at 1, online: http://www.fta.dot.gov/documents/Unit1_01CRSReport.pdf.

[195] Kevin S. Hanna, eds., *Environmental Impact Assessment: Practice and Participation*, 2005, (Oxford University Press: Ontario) at 18; United Nations, *Report of the United Nations Conference on the Human Environment*, 1972, online: http://www.un-documents.net/aconf48-14r1.pdf.

[196] Hanna, *Ibid.*

[197] M. Husain Sadar and William J. Stolte, "An Overview of the Canadian Experience in Environmental Impact Assessment (EIA"), 1996, *Impact Assessment*, 74, at 215-228.

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[198] Franson and Lucas, *supra* note 4, at 1401.

[199] Franson and Lucas, *Ibid*, at 1402.

[200] Franson and Lucas, *Ibid*.

[201] Franson and Lucas, *Ibid*, at 1402 (Section A: Policy).

[202] Franson and Lucas, *Ibid*, at 1404 (Section B: Implementation, (a), (b)).

[203] Franson and Lucas, *Ibid*, at 1404 (Section B: Implementation, (c)).

[204] Franson and Lucas, *Ibid*, at 1404 (Section B: Implementation (d)).

[205] Franson and Lucas, *Ibid*, at 1405 (Appendix 1) Project Descriptions were required to contain: information and technical data on the proposed project; relevant drawings, plans, photos, maps, charts, etc.; a description of and statement of rationale for the undertaking; the alternative methods of carrying out the undertaking and the alternatives to the undertaking; a description of all facilities and structures; information on anticipated waste generation; compliance methods; transportation requirements; organization structure that will administer and manage all aspects of the project.

[206] Franson and Lucas, *Ibid*, at 1406-1407 (Appendix 2(A)) Environmental Assessments were required to discuss: primary and secondary effects; Short and long-term impacts; all ecological changes expected and the implication of these ecological changes as related to air, water, and soil; the time frame in which impacts are anticipated; remedial, protective, and corrective measures to be implemented if required.

[207] Franson and Lucas, *Ibid*, at 1407 (Appendix 2(B)) Environmental Impact Assessments were required to address: the type and magnitude of any adverse impact which cannot be reduced in severity; the implications of impacts which cannot be eliminated or reduced; the effectiveness and costs of possible abatement and mitigation measures.

[208] Franson and Lucas, *Ibid*, at 1407 (Appendix 2(C)) Environmental Impact Assessments were required to address: alternative facility configuration; alternative locations for proposed projects; alternatives to the proposed project; an analysis of alternatives that was structured in a way that permitted comparison of environmental benefit or damage.

[209] Franson and Lucas, *Ibid*, at 1407-1408 (Appendix 2(D)) Environmental Impact Assessments were required to address: cumulative and long-term effects of the proposed action which either significantly reduce or enhance the state of the environment should be described; effects that narrowed the range of beneficial uses of the environment or posed long-term risks to health or property; immediate long-term environmental effects; irreversible environmental damage which could result from accidents associated with the proposed action.

[210] Franson and Lucas, *Ibid*, at 1408-1409 (Appendix 3).

[211] Franson and Lucas, *Ibid*, at 1409 (Appendix 3).

[212] S.M. 1987-88, c. 26, s. 1(1).

[213] S.M. 1987-88, c. 26, s. 2(1).

[214] S.M. 1987-88, c. 26, s. 1(2) "environment".

[215] Lobe, supra note 192, at 295.

[216] Manitoba Environment, *A Guide to Manitoba's Environment Act: Roles and Responsibilities*, (1987: Government of Manitoba), at 4, 6, 7-12; Lobe, *Ibid*, at 294.

[217] S.M. 1987-88, c. 26, s. 6.

[218] S.M. 1987-88, c. 26, s. 41(2).

[219] S.M. 1987-88, c. 26, s. 4. This Section of *The Environment Act* was repealed in 1997. There were four State of the Environment Reports Produced in 1991, 1993, 1995, and 1997.

[220] S.M. 1997, c. 61, s. 21(3).

[221] Lobe, *supra* note 192, at 295.

[222] See *Amy Street Heating Plant Regulation*, M.R. 88/88; *Campground Regulation* M.R. 89/88; *Classes of Development Regulation* M.R. 164/88; *Designation of Critical Areas*, M.R. 125/88; *Disposal of Whey Regulation*, M.R. 90/88; *Incinerators Regulation*, M.R. 91/88; *Inco Limited and Hudson Bay Mining and Smelting Co. Limited Smelting Complex Regulation*, M.R. 165/88; *Licensing Procedures Regulation* M.R. 163/88; *Litter Regulation* M.R.

92/88; *Livestock Production Operation Regulation* M.R. 93/88; *Pesticides Regulation* M.R. 94/88; *Private Sewage Disposal Systems and Privies Regulation* M.R. 95/88; *Pulp and Paper Mills Liquid Effluent Discharges Regulation* M.R. 96/88; *Waste Disposal Grounds Regulation* M.R. 98/88; *Sensitive Areas Regulation* M.R. 126/88; *Storage and Handling of Gasoline and Associated Products Regulation* 97/88.

[223] S.M. 1988-89, c. 13, s. 10; S.M. 1989-90, c. 26; S.M. 1989-90, c. 60, s. 10; SM 1989-90, c. 90, s. 15; S.M. 1990-91, c. 15; S.M. 1991-92, c. 41, s. 9; S.M. 1992, c. 23; S.M. 1993, c. 26; S.M. 1993, c. 48, s. 13 and 61; S.M. 1994, c. 20, s. 6; S.M. 1995, c. 33, s. 7; S.M. 1996, c. 40, s. 67; S.M. 1997, c. 61, s. 21; S.M. 2000, c. 11, s.7; S.M. 2000, c. 35, s. 38; S.M. 2000, c. 44, s. 4; S.M. 2002, c. 6; S.M. 2002, c. 36, s. 40; S.M. 2005, c. 42, s. 27; S.N. 2005, c. 26, s. 43; S.M. 2006, c. 24, Part 2; S.M. 2008, c. 39; S.M. 2009, c. 25; S.M. 2010, c. 33, s. 17; S.M. 2011, c. 36, Part 2; S.M. 2012, c. 40, s. 58; S.M. 2013, c. 35, Part 2; S.M. 2013, c. 39, Sch. A, s. 55; S.M. 2014, c. 21; S.M. 2014, c. 27, s. 63.

H. Sustainable Development: 1990s - Present

[224] The World Commission on Environment and Development, *Our Common Future*, 1987 http://conspect.nl/pdf/Our_Common_Future-Brundtland_Report_1987.pdf at 15 ("*Brundtland Report*").

[225] Brundtland Report, *Ibid*, at 15.

[226] For example, the topic of sustainable development has been discussed extensively on the international level: the topic was a major focus of the Rio Declaration on Environment and Development (United Nations, 1992), Agenda 21 [a non-binding, voluntarily implemented action plan of the United Nations with regard to sustainable development] (1992), The World Summit on Sustainable Development (2002), United Nations Conference on Sustainable Development, Rio 20+ (2012), and continues to be discussed and developed at events like the UN's latest Symposium in Tehran, Islamic Republic of Iran (Oct. 14, 2014-Oct. 16, 2014).

[227] In the last few years, Manitoba has witnessed a number of large scale developments move through the environmental assessment and licensing process. The regulatory bodies overseeing public hearings and the interveners involved in such proceedings have increasingly focused on Manitoba's existing legal framework and its support of sustainable development principles and practices. Such developments include: Centerport Express Way, City of Winnipeg (Licensed June 2012), Bipole III Transmission Project (Licensed August 2013), Keeyask Generation Project (Licensed July 2014). See also the Public Utility Board's Needs for and Alternatives Review for Manitoba Hydro's Preferred Development Plan (see endnote 604).

[228] John Sinclair and Lisa Quinn, "From Idea to Practice: Sustainable Development Efforts in Manitoba", (2012) *The Dalhousie Law Journal*, 35(1), at 35.

[229] Sinclair and Quinn, *Ibid*, at 36.

[230] MRTEE, *A Discussion Paper for a Sustainable Development Act*, 1994, at 8. See the discussion of sustainability assessments in Chapter 4.

[231] Manitoba, *White Paper on the Sustainable Development Act* (Winnipeg: Sustainable Development Coordination Unit, 1996), see Section 7.

[232] See SM 1997, c. 61; Sinclair and Quinn, *supra* note 228, at 39.

[233] Manitoba Conservation, *Implementing Sustainable Development for Future Generations: Manitoba's Sustainable Development Strategy* (2000), at 2.

[234] *Ibid*, at 4.

[235] Manitoba Conservation, *supra* note 9, at 4.

[236] RAS Consulting, *Report from the Chair, Environment Act Amendment Core Group 2002 Proposed Environment Act Amendments*, (2002).

[237] *Ibid*, at 2-4.

[238] SM 1997, c. 61.

[239] Government of Manitoba, *TomorrowNow – Manitoba's Green Plan*, 2nd edition (2014), online: http://www.gov.mb.ca/conservation/tomorrownowgreenplan/, at 6, 7, 35, 39, 45.

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[240] Government of Manitoba, *Consultation on Proposed Green Prosperity Act*, 2013; Government of Manitoba, *Green Prosperity Act – Working Group Meeting: What You Told Us*, 2013, online ; Canadian Centre for Policy Alternatives – Manitoba, *"Sustainable Development" – What's in a name?*, February 14, 2013, online: http://www.policyalternatives.ca/sites/default/files/uploads/publications/Manitoba%20Office/2013/02/SD%20Laser%20and%20Lecuyer_0.pdf.

CHAPTER 3: *THE ENVIRONMENT ACT*: ENVIRONMENTAL ASSESSMENT AND LICENSING

[241] Wood, *supra* note 1, at 92.

[242] Government of Manitoba, *Environmental Approvals*, online: http://www.gov.mb.ca/conservation/eal/

[243] Government of Manitoba, *Environmental Compliance and Enforcement*, online: http://www.gov.mb.ca/conservation/ecc/index.html.

[244] Under the Act, only an Environmental Act Proposal is mandatory. The director/Minister is given the discretion to decide whether a scoping document and environmental assessment report are required.

[245] *Classes of Development Regulation*, Man Reg *164*/88.

[246] For example, if a proponent requests an alteration to an already existing and operating development under s. 14(3) of the Act, the Minister can require that the proponent undertake a new environmental assessment of the development to assess any new potential effects.

[247] See *Campbell Soup Co. v. Manitoba* (1991), 74 Man.R. (2d) 237 [*Campbell Soup*].

[248] However, the Lieutenant Governor-in-Council has the power to expand the *Classes of Development Regulations* to include new projects. [See s. 41(1)(a)].

[249] Government of Manitoba, *Information Bulletin – Environmental Assessment and Licensing under The Environment Act*, (June 2013), at 1, online: http://www.gov.mb.ca/conservation/eal/publs/info_eal.pdf.

[250] Under the *Environment Act Fees Regulation*, M.R. 168/96, the fees are as follows:
Class 1 Developments: $1,000; Class 2 Developments: $7,500; Class 3 Developments: Transportation and Transmission Lines - $10,000/Water Developments - $60,000/Energy and Mining - $120,000.

[251] Government of Manitoba, *Environment Act Proposal Form*, 2014, online: http://www.gov.mb.ca/conservation/eal/publs/eap_form.pdf.

[252] Manitoba, *Licencing Procedures Regulation* 163/88, Section 1.1.

[253] Government of Manitoba, *Information Bulletin – Environment Act Proposal Report Guidelines*, (February 2014), online: http://www.gov.mb.ca/conservation/eal/publs/info_eap.pdf.

[254] Lobe, *supra* note 192 at 297.

[255] *Supra* note 252 - see section 1(1)(a)-1(1)(l) for a complete list of the EAP requirements.

[256] See C.C.S.M c. E125, s. 10(4), 11(8), 12(4), 17.

[257] Manitoba, *supra* note 5, s. 10(4); s. 11(8); s. 12(4). The Interdepartmental Planning Board is appointed by the Lieutenant Governor-in-Council and consists of officials from government departments and agencies involved in matters related to land use and development. [See *The Planning Act*, 2005, C.C.S.M., c. P80, s. 190(1)-190(2)]. It should be noted that the Commission has received inconclusive feedback throughout this Project which suggests that the IPB is no longer in existence and that the EAB now relies exclusively on the TAC for additional review.

[258] Government of Manitoba, *supra* note 242.

[259] The Technical Advisory Committee, established under section 5 of the Act, consists of provincial and federal government specialists who are able to provide technical expertise.

[260] For example, Public Registry File 5709.00 – City of Winnipeg – Southwest Rapid Transit Corridor – Stage 2: Information Request, July 31, 2014, online: http://www.gov.mb.ca/conservation/eal/registries/5709citywpgrapidtransit/information.request.pdf; Response to Information Request, July 31, 14, 2014, online: http://www.gov.mb.ca/conservation/eal/registries/5709citywpgrapidtransit/response.to.information.request.pdf

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[261] For **Class 1 developments**, the Director can require: additional information as the director deems necessary, issue guidelines and instructions for the proponent to conduct further studies, detailed plans for environmental protection and management [s. 10(6)(a)-(c)]; for **Class 2 developments**, the Director can require: additional information, issue guidelines and instructions for the assessment and require the proponent to carry out public consultation, require the proponent to prepare and submit to the director an assessment report to include such studies, research, data gathering and analysis or monitoring, alternatives to the proposed development processes and locations, and the details of proposed environmental management practices to deal with the issues [s. 11(8)(a)-(c)]; for **Class 3 developments**, the Minister can require: additional relevant information, issue guidelines and instructions for the assessment and require the proponent to carry out public consultation, require the proponent to prepare and submit an assessment report to include such studies, research, data gathering and analysis or monitoring, alternatives to the proposed development processes and locations, and the details of proposed environmental management practices to deal with the issues as the minister deems necessary [s. 12(5)(a)-(c)].

[262] See Manitoba, *supra* note 249, at 2.

[263] For example: Keeyask Hydropower Limited Partnership, *Keeyask Generation Project: Scoping Document*, 2011, online: http://www.gov.mb.ca/conservation/eal/registries/5550keeyask/scope_doc.pdf ; Manitoba Hydro, *Bipole III Transmission Project: A Major Reliability Improvement Initiative: Environmental Assessment Scoping Document*, 2010, online: http://www.gov.mb.ca/conservation/eal/registries/5433bipole/scopedoc.pdf.

[264] Government of Manitoba, *Guidelines for the Preparation of an Environmental Impact Statement for the Louisiana Pacific Canada Ltd. Twenty Year Forest Management Plan,* 2010, online: http://www.gov.mb.ca/conservation/eal/registries/3893lp/eis_guide_final.pdf ; Government of Manitoba, *Wuskwatim Generation & Transmission Projects – EIS Guidelines: Consultation on Draft Guidelines for the Preparation of the Environmental Impact Statement – What You Told Us,* 2002, online: http://www.gov.mb.ca/conservation/eal/registries/4724_5wuskwatim/consultation.html ; Government of Manitoba, *Guidelines for the Preparation of the Environmental Impact Statement*, 2002, online: http://www.gov.mb.ca/conservation/eal/registries/4724_5wuskwatim/wuskwatimgenstn-guidelines.html

[265] The Act gives the director/Minister authority to require the preparation of an environmental assessment report only for Class 2 and 3 Developments. The content of such a report may include information about studies, research, data gathering and analysis or monitoring, and alternatives to the proposed development processes and locations. [Manitoba, *supra* note 5, s.11(9)(c), 12(5)(c)].

[266] The Director may request that the Minister direct the chairperson of the CEC to conduct a public hearing (s. 10(6)), or the Minister may require a public hearing under s. 11(9) or 12(5).

[267] Lobe, *supra* note 192, at 301.

[268] Manitoba, *supra* note 5, s. 12(8).

[269] These statistics were calculated by reviewing the Environment Act licences available on Conservation and Water Stewardship's Public Registry from 2004-2014 and calculating the number of licenses issued for each Class, per calendar year.

[270] Manitoba, *supra* note 5, s.12(2); s.19; s.20; s.24; s.24.1; s.30; s.31; s.33.

[271] Penny Becklumb and Tim Williams, *Canada's New Federal Environmental Assessment Process*, (2012: Library of Parliament), at 1, online: http://www.parl.gc.ca/Content/LOP/ResearchPublications/2012-36-e.pdf [Becklumb and Williams]

[272] *Ibid.* See also – Canadian Environmental Assessment Agency, *Frequently Asked Questions: Milestones in the History of Federal Environmental Assessment: Cabinet Policy*, online: http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=CE87904C-1#ws9FFC22CE.

[273] Canadian International Development Agency, *Implementation of the Canadian Environmental Assessment Act*, (2000: Government of Canada), at 9, online: http://www.acdi-cida.gc.ca/inet/images.nsf/vLUImages/Performance%20Review%20Branch/$file/ImplementationofCanadianEnvironmentalAssessmentAct(CEAA).pdf ["CIDA"].

[274] *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. Note: Sections 61 to 70, 73, 75 and 78 to 80 came into force December 22, 1994, and Sections 1 to 60, 71, 72, 74, 76 and 77 came into force January 19, 1995.

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[275] CIDA, *supra* note 273.

[276] See Parliament of Canada, *C-38: An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*, 2012, online: http://www.parl.gc.ca/LEGISinfo/BillDetails.aspx?billId=5514128&Mode=1&Language=E.

[277] Canadian Environmental Assessment Agency, *Questions*, 2014, online: http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=CE87904C-1#wsAD37D83B.

[278] Government of Canada, *Overview: Canadian Environmental Assessment Act, 2012*, online: https://www.ceaa-acee.gc.ca/default.asp?lang=en&n=16254939-1.

[279] Government of Canada, *Canada's Economic Action Plan: Overview*, online: http://actionplan.gc.ca/en/page/r2d-dr2/overview ; Government of Canada, *Canada's Economic Action Plan: Streamlining the Regulatory Process: Improved Efficiency and Reduced Duplication*, online: http://actionplan.gc.ca/en/backgrounder/r2d-dr2/streamlining-regulatory-process-improved.

[280] Brenda Heelan, *The Difference a Year Makes: Changes to Canadian Federal Environmental Assessment Law in 2012* (February 28, 2013) LawNow, online: http://www.lawnow.org/canadian-federal-environmental-assessment-law/ ; Gibson, *supra* note 7; Doelle, *supra* note 7; Priyanka Vittal, *The Canadian Environmental Assessment Act (CEAA) 2012: A Plain Language Summary*, (July 2012: Canadian Environmental Network), online: http://rcen.ca/sites/default/files/vittal_ceaa_2012_plain_language.pdf; West Coast Environmental Law, *CEAA 2012 On the Ground*, 2012, online: http://wcel.org/resources/environmental-law-alert/ceaa-2012-ground.

[281] Government of Canada, *supra* note 278; CEAA *Frequently Asked Questions*, 2014, online: http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=CE87904C-1#wsAD37D83B; CEAA, *Environmental Assessment Process Managed by the Agency*, 2013, online: https://www.ceaa-acee.gc.ca/Content/1/6/2/16254939-1C3C-48A4-B99D-77E34A5DF1EE/EA_processes-Processus.pdf; Becklumb and Williams, *supra* note 271, at 1.

[282] This includes but is not limited to: stricter timelines, stronger enforcement mechanisms, and a focus on improving consultation with Aboriginal communities.

[283] This is in large part because the types and size thresholds of projects identified by *CEAA, 2012*'s *Regulations Designating Physical Activities,* which outlines which projects require a federal environmental assessment, are quite different from the regulations under the former *CEAA*. See S.C. 2012, c. 19, s.52, ss.8(1), 13, 14, 15; SOR/2012-147.

[284] Canada, *supra* note 6, ss. 32–37.

[285] Becklumb and Williams, *supra* note 271, at 6.

[286] Heelan, *supra* note 280.

[287] Becklumb and Williams, *supra* note 271 at 6. Please note that any member of the public can still provide their comments to a review panel in writing.

[288] "It is at the Minister's discretion to decide whether projects not on the Project List Regulation will be subject to an environmental assessment, whether to refer the environmental assessment to a review panel, whether to accept a provincial environmental assessment process as a substitute for the federal one, whether the time limit can be extended, which members of the public may participate in the process, under what conditions the project will or will not proceed, and what requirements project proponents will be forced to comply with." [Vittal, *supra* note 280, at 4].

[289] Vittal, *Ibid.*

[290] Doelle, *supra* note 7 at 17.

[291] Canadian Council of Ministers of the Environment, *A Canada-Wide Accord on Environmental Harmonization*, 1998, online: http://www.ccme.ca/files/Resources/harmonization/accord_harmonization_e.pdf.

[292] Canadian Council of Ministers of the Environment, *Sub-Agreement on Environmental Assessment*, 1998, online: http://www.ccme.ca/files/Resources/harmonization/envtlassesssubagr_e.pdf.

[293] It should be noted that the government of British Columbia signed a Memorandum of Understanding with the Canadian Environmental Assessment Agency on Substitution of Environmental Assessments on March 6, 2013 - online: http://www.eao.gov.bc.ca/pdf/EAO_CEAA_Substitution_MOU.pdf ; http://www.bht.com/tw_191 See also – CEAA, *Backgrounder: Substitution of the federal environmental assessment process under CEAA, 2012*, (2013), online: https://www.ceaa-acee.gc.ca/default.asp?lang=En&xml=0719702C-270E-4D5F-8609-5DB1461C9951. It is

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not clear if this type of understanding will take the place of the old co-operation agreements or if such a MOU will be signed with other provincial governments.

[294] *Canada-Manitoba Agreement on Environmental Assessment Cooperation*, 2007, online: http://www.gov.mb.ca/conservation/eal/publs/cdamb_coop.pdf ; See also – Conservation and Water Stewardship, *Canada-Manitoba Agreement on Environmental Assessment Cooperation: Questions and Answers*, 2007, online: http://gov.mb.ca/conservation/eal/publs/cdamb_coop_info.pdf.

[295] Examples include: Wuskwatim Generating Station, which was issued an Environment Act Licence on June 21, 2006 [Licence No. 2699] and Keeyask Generation Project, which was issued an Environment Act Licence on July 2, 2014 [Licence No. 3107].

CHAPTER 4- REFORMING THE ENVIRONMENT ACT

[296] Jamie Benidickson, *Environmental Law, 4th ed.*, 2013 (Irwin Law: Toronto, ON), at.254.

[297] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 71.

[298] *R v Al Klippert Ltd*, [1998] 1 SCR 737 at para 16.

[299] Hanna, *supra* note 195, at 19.

A. Aboriginal Communities and Environmental Assessment

[300] Statistics Canada, *Aboriginal Peoples in Canada: First Nations People, Métis and Inuit*, (2011), at 8.
Note: As discussed in the first chapter of this Report, the use of the term "Aboriginal" refers to the first inhabitants of Canada, and includes First Nations, Inuit, and Métis peoples as defined in Section 35 of the *Constitution Act, 1982*.

[301] *Ibid*, at 4, 10.

[302] Manitoba Aboriginal and Northern Affairs, *Manitoba's Aboriginal Community*, online: http://www.gov.mb.ca/ana/community/mb_community.html; Manitoba Bureau of Statistics, *Manitoba Aboriginal Population Projections: 2001 to 2026*, (2005); Stats Canada 'Aboriginal Peoples in Canada in 2006: Inuit, Metis and First Nations, 2006 Census' (Minister of Industry) at 6-8, 11.

[303] Gordon E. Hannon, *The Divided Indivisible Crown: A Provincial Perspective on Treaty Rights*, (2011) Prepared for CBA National Aboriginal Law Conference, online: http://www.cba.org/cba/cle/PDF/ABOR11_Hannon_Paper.pdf

[304] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the Constitution]. See also *Haida Nation v. British Columbia (Minister of Forests)* 2004 S.C.C. 73, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* 2003 SCC 74, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388; *R v. Sparrow* [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R v. Marshall* [1999] 3 S.C.R. 456; Benjamin J. Richardson, *Indigenous Peoples and the Law : Comparative and Critical Perspectives*, (2009: Hart Publishing); Government of Canada, "Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult" (AADNC: 2011), at 1, 5.

[305] The Crown may delegate certain procedural aspects of the Crown consultation process, such as the gathering of information about the impact of the proposed project on the potential or established Aboriginal or Treaty rights. See Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation – Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, 2011, online: http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675. This ability to incorporate proponents in section 35 consultation has been recognized by provincial governments like Alberta, Ontario, and Nova Scotia - See Alberta, *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013*, at 6, online: http://www.Aboriginal.alberta.ca/documents/GOAPolicy-FNConsultation-2013.pdf; Nova Scotia, *Government of New Brunswick Duty to Consult Policy*, at 4, online: http://www2.gnb.ca/content/dam/gnb/Departments/aas-saa/pdf/en/DutytoConsultPolicy.pdf; Ontario, *Duty to Consult with Aboriginal peoples in Ontario*, online: https://www.ontario.ca/government/duty-consult-Aboriginal-peoples-ontario.

The issue of delegation in Crown Consultation and the involvement of third parties like proponents is an ongoing issue that continues to be addressed by the work of Aboriginal organizations so it is possible that the duties associated with Consultation under the Constitution may be adjusted in the future. As an example see First Nations Leadership Council, *Advancing an Indigenous Framework for Consultation and Accommodation in BC*, 2013, online: http://www.fns.bc.ca/pdf/319_UBCIC_IndigActionBook-Text_loresSpreads.pdf.

[306] There is also confusion because two levels of government are involved. Aboriginal Affairs and Northern Development Canada (AANDC) is responsible at the Federal level and Manitoba Aboriginal and Northern Affairs is responsible at the provincial level. These departments are organized differently and have different duties.

[307] Many participants felt that section 35 consultation and the environmental assessment and licensing process should be better coordinated so that potentially affected communities were better able to participate and understand their different rights and roles in conjunction with both legal processes. It was also suggested that the proponent should play a stronger role in the s. 35 consultation process, that the EIS and other assessment documentation should include a clearer picture of the potential impacts on affected First Nations communities. Other feedback includes:

- "Any legislative reform in this regard will require establishing better linkages between the s. 35 consultation process and proponent-led engagement activities. Representatives at the Aboriginal Relations Branch could, for instance, work closely with proponents during the pre-filing/scoping stage to determine which communities might be interested in the project, which communities might be impacted and how best to engage with them."
- "There should be better timing – coordination between s. 35 consultation and public participation processes. Section 35 consultation should not take place after the EIS is complete/reviewed."
- "Proponent involvement with First Nations should be based on a sharing of relevant Project information, including possible effects and related mitigation, offsetting, compensation or other accommodation measures, that can be used by the Crown to inform its required consultation activities and to fulfill its duty."

[308] Participants identified a need for a more comprehensive explanation to be given to First Nation communities at the beginning of all related consultation/public participation processes to explain the connections between such processes and the benefits of participating in all available consultation opportunities. There were also many suggestions for improved guidance for the collection and use of Aboriginal Traditional Knowledge (ATK) and guidance for proponents about interacting with Aboriginal communities during their project planning and assessment.

[309] Participant comments about Aboriginal Traditional Knowledge include:

- "In many instances, Aboriginal Traditional Knowledge is missing or included improperly in EIS, guidance documents on the collection and use of such information would be helpful."
- "Equal weight should be given to scientific knowledge and Traditional Ecological Knowledge"
- "Some of ATK is very recent information that does not go back to treaty time. There is no simple fix in this area. If a proponent fails to adequately obtain and use ATK, have they necessarily failed in the process? ATK falls into the category of things that are conceptually very good but often difficult to actualize."

The Committee also discussed the possible incorporation of Ownership, Control, Access and Possession (OCAP) Principles into the Act. See FNCPN, *OCAP: Partnership, Control Access and Possession*, 2007, online: http://cahr.uvic.ca/nearbc/documents/2009/FNC-OCAP.pdf; First Nations Information Governance Centre, *The First Nations Principles of OCAP*, 2013, online: http://www.fnigc.ca/ocap.html.

See also the CEC's Non-Licensing Recommendation 6.2 from: *Report on Public Hearing Bipole III Transmission Project*, June 2013, at 27, see also at 20-27.

[310] Participant comments include: "COSDI Recommendation 7 outlines a process for developing a consultation strategy and protocol for involvement of Aboriginal peoples in land and resource use planning, significant resource allocation, development assessment and review and regulatory mechanisms. The COSDI recommended process should be pursued."

[311] For example, see United Nations, *Declaration on the Rights of Indigenous Peoples*, 2008, online: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf; UNESCO, *Convention for the Safeguarding of the Intangible Cultural Heritage*, 2003, online: http://www.unesco.org/culture/ich/en/convention.

[312] Please note that three First Nations in Manitoba: Opaskwayak Cree Nation (OCN), Chemawawin Cree Nation (CCN), and Swan Lake First Nation (SLFN), have established their own land codes in order to govern reserve lands

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and resources under the *First Nations Land Management Act*, S.C. 1999, c. 24. OCN was one of the 14 First Nations to sign the *Framework Agreement on First Nations Land Management* in 1996. CCN and SLFN established the same management powers in 2010. Six other First Nations in Manitoba: Long Plain, Brokenhead, Sagkeeng, Fisher River, Norway House and Nelson House are in the process of developing their own management systems.

It should also be noted that the Sioux Valley Dakota Nation signed a Self-government agreement in August 2013 that sets out the Sioux Valley Dakota Oyate government arrangements and provides for a government-to-government relationship between Canada and Sioux Valley Dakota Nation (SVDN) [Manitoba, *Sioux Valley Dakota Nation Governance Agreement*, August 30, 2013, online: http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/sioux_valley_dakota_governance_agree_1385740747357_eng.pdf].

The Agreement will remove SVDN from the *Indian Act* (R.S.C., 1985, c. I-5) and allows for the creation of a legal framework for the First Nation that will co-exist with current federal and provincial laws. Sections 15 and 16 of the Self-Government Agreement provide the SVDN with the authority to control natural resource and environmental laws (including environmental assessment practices and procedures) within the Nation's area of jurisdiction. This could result in the development and implementation of environmental assessment procedures within the jurisdiction of SVDN that differ from the environmental assessment requirements under *The Environment Act*.

B. Sustainability Assessment

[313] For a discussion of this fourth stage, see: Robert Gibson and Kevin Hanna, *Progress and Uncertainty: The Evolution of Federal Environmental Assessment in Canada*, 2009, at 19 – in Hanna, eds. 2nd ed. (*supra* note 195); Robert Gibson, "From Wreck Cove to Voisey's Bay: The evolution of federal environmental assessment in Canada" (2002) *Impact Assessment and Project Appraisal* 20(2); Republic of South Africa, Department of Environmental Affairs, *Sector Guidelines for Environmental Impact Assessment Regulations*, (2010), at 15.

[314] Manitoba, *White Paper on the Sustainable Development Act* (Winnipeg: Sustainable Development Coordination Unit, 1996); COSDI, *supra* note 8; Manitoba Conservation, *supra* note 9 at 4; RAS Consulting, *supra* note 236, 2-4; Gibson, Robert B., *Sustainability-based assessment criteria and associated frameworks for evaluations and decisions: theory, practice and implications for the Mackenzie Gas Project Review, a report prepared for the Joint Review Panel for the Mackenzie Gas Project*, final report 26 January 2006b; Kyrke Gaudreau and Robert Gibson, *Framework for Sustainability-based Assessment for the Keeyask Hydro Project*, 2013.

[315] Kyrke Gaudreau and Robert Gibson, *Framework for Sustainability-based Assessment for the Keeyask Hydro Project*, 2013, at 16.

[316] RAS Consulting, *supra* note 236, at 2. Exceptions under federal environmental assessment law include provisions for a broader scope including direct socio-economic and cultural effects where Aboriginal interests are involved.

[317] The generic sustainability requirements that have been suggested by academics, practitioners and industry during the last few decades have remained for the most part unchanged and continue to be championed by a range of interest groups. For example see, Robert Gibson, *Sustainability Assessment: Criteria and Processes*, (London: Earthscan 2005) and Mining, Minerals and Sustainable Development North America, *Seven Questions to Sustainability: How to Assess the Contribution of Mining and Mineral Activities*, 2002, online: http://www.iisd.org/pdf/2002/mmsd_sevenquestions_brochure.pdf.

[318] For example, such assessments have occurred in England, Australia, and other parts of Canada (e.g. in the joint panel reviews of the Voisey's Bay Nickel Mine and Mill Project in Newfoundland and Labrador, the Kemess North mine in British Columbia, the Whites Point Quarry and Marine Terminal in Nova Scotia, and the Mackenzie Gas Project in the NWT). An encyclopaedic review of sustainability assessment (called sustainability appraisal following UK terminology) is provided in Barry Dalal-Clayton and Barry Sadler, *Sustainability Appraisal: a sourcebook and reference guide to international experience* (London: Earthscan, 2014)

[319] See COSDI, *supra* note 8.

[320] For example, *The Mines and Minerals Act*, and *The Planning Act* both contain sustainability requirements that projects must comply with along with those discussed in *The Sustainable Development Act*.

[321] This paper, published in 1998, "determined that an Education Strategy is needed in order to fully understand and communicate the importance of sustainable development and to ensure its successful implementation throughout Manitoban society." (at 2).

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[322] The Government of Manitoba first announced possible reform of *The Sustainable Development Act* in the 2009 Throne Speech, 4th Session of the 39th Legislature, and released their *Consultation on Proposed Green Prosperity Act* in 2013. The comment period for The Green Prosperity Act closed on March 21, 2013. One public consultation session was held in 2013. It is unclear what has been done with the public feedback received by the Government or when reforms will be proposed in Legislature.

[323] Manitoba, *supra* note 5, s. 1(1)(c).

[324] One exception is Water Power Act Licences that must be obtained by projects such as hydroelectric generating stations. For many projects there are often a number of permits and other minor legal approvals that must be obtained under other legislation in Manitoba, which are usually addressed in the final Environment Act Licence.

[325] Wood, *supra* note 1, at 91.

[326] *Classes of Development Regulation* M.R.164/88; *Environment Act Fees Regulation* M.R. 168/96; *Environmental Assessment Hearing Costs Recovery Regulation* M.R. 210/92; *Joint Environmental Assessment Regulation* M.R. 126/91; *Licensing Procedures Regulation* M.R. 163/88; *Participant Assistance Regulation* M.R. 125/91.

[327] The title "Class 1 Developments" precedes section 10; "Class 2 Developments" precedes section 11; and "Class 3 Developments" precedes section 12. Section 11.1 is preceded by the title "Minister May Consider Class 1 or 2 Proposals" and sections 12.0.1 to 57 is preceded by the title "Miscellaneous Provisions Respecting Proposals".

[328] **Jurisdictions with an Environmental Assessment Act**: Canada, British Columbia, Nunavut, Ontario, Saskatchewan, and Yukon Territory.
Jurisdictions with an Environmental Assessment Regulation: Alberta, New Brunswick, Newfoundland & Labrador, Nova Scotia, Quebec.

[329] Alberta, *Environmental Protection and Enhancement Act* R.S.A. 2000, c. E-12 [*EPEA*]. These parts and divisions include: Part 1. Administration: Consultation, Communication and Education; General Administrative Matters Part 2. Environmental Assessment Process, Approvals and Registrations - Division 1: Environmental Assessment Process - Division 2: Approvals, Registrations and Certificates; Part 3: Activities Requiring Notice; Part 4: Environmental Appeals Board; Part 5: Release of Substances; Part 6: Conservation and Reclamation; Part 7: Potable Water; Part 8: Hazardous Substances and Pesticides; Part 9: Waste Minimization, Recycling and Waste Management; Part 10: Enforcement; Part 11: Miscellaneous Provisions.

[330] For example, those relating to the environmental assessment process include, but is not limited to: *Activities Designation*, 276/2003; *Approvals and Registrations Procedure*, 113/93; *Disclosure of Information*, 273/2004; *Environmental Assessment*, 112/93; *Environmental Assessment (Mandatory and Exempted Activities)*,111/93; *Environmental Protection and Enhancement (Miscellaneous)*, 118/93.

[331] Yukon, S.C. 2003, c. 7.

[332] Part 1 – Yukon environmental and socio-economic assessment board and designated offices and Part 2 – Assessment Process and Decision Documents. See *Assessable Activities, Exceptions and Executive Committee Projects Regulations*, SOR/2005-379 and *Decision Body Time Periods and Consultation Regulations*, SOR/2005-380.

[333] British Columbia, SBC 2002 c. 43.

[334] Part 1 – Definitions; Part 2 - Administration and Application of the Environmental Assessment Process; Part 3 – Environmental Assessment Process; Part 4 – Special Provisions for Environmental Assessment Process; Part 5 – Sanctions; Part 6 – General Provisions. See *Concurrent Approval Regulation*, BC Reg 371/2002; *Prescribed Time Limits Regulation*, BC Reg 372/2002; *Public Consultation Policy Regulation*, BC Reg 373/2002; *Reviewable Projects Regulation*, BC Reg 370/2002; *Environmental Assessment Fee Regulation*, BC Reg 50/2014; and *Transition Regulation*, BC Reg 374/2002.

[335] Wood, *supra* note 1, at 93.

[336] Wood, *Ibid.*

[337] Wood, *Ibid.*

[338] Wood, *Ibid.*

[339] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed (LexisNexis Canada Inc, 2008) at 387

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[340] *Council of Canadians with Disabilities v Via Rail Canada Inc*, [2007] SCJ No 15, [2007] 1 SCR 650 at para 287

[341] Section 1(1) of the Act states:

> The intent of this Act is to develop and maintain an environmental protection and management system in Manitoba which will ensure that the environment is protected and maintained in such a manner as to sustain a high quality of life, including social and economic development, recreation and leisure for this and future generations, and in this regard, this Act
>
> (a) is complementary to, and support for, existing and future provincial planning and policy mechanisms;
> (b) provides for the environmental assessment of projects which are likely to have significant effects on the environment;
> (c) provides for the recognition and utilization of existing effective review processes that adequately address environmental issues;
> (d) provides for public consultation in environmental decision-making while recognizing the responsibility of elected government including municipal governments as decision makers; and
> (e) prohibits the unauthorized release of pollutants having a significant adverse effect on the environment.

[342] Alberta: *EPEA*, *supra* note 329, s. 2(c); Nova Scotia: *Environment Act*, N.S. 1994-5, c. 1, s. 2;

[343] Alberta: *EPEA*, s. 2(d);

[344] Alberta: *EPEA*, s. 2(e);

[345] Alberta: *EPEA*, s. 2(f); Nova Scotia: *Environment Act*, N.S. 1994-5, c. 1, s. 2(b)(iv);

[346] Alberta: *EPEA*, s. 2(h); Nova Scotia: *Environment Act*, N.S. 1994-5, c. 1, s. 2(g);

[347] Alberta: *EPEA*, s. 2(i); Nova Scotia: *Environment Act*, N.S. 1994-5, c. 1, s. 2(c);

[348] Nova Scotia: *Environment Act*, N.S. 1994-5, c. 1, s. 2(b)(ii);

[349] Nova Scotia: *Environment Act*, N.S. 1994-5, c. 1, s. 2((b)(iii)(C);

[350] Nova Scotia: *Environment Act*, N.S. 1994-5, c. 1, s. 2(h)

[351] NWT, *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25, s. 114(c) [*MVRMA*]

[352] NWT, *Ibid*, s. 115(1)(c)

[353] EPEA, *supra* note 329, s. 39(d).

[354] British Columbia, *supra* note 333, s. 1.

[355] New Brunswick, *Clean Environment Act*, R.S.N.B. 1973, c. C-6.

[356] Manitoba, *supra* note 5, Section 1(2).

[357] Saskatchewan, *The Environmental Assessment Act*, S.S. 1979-80, c. E-10.1, Section 2(d).

[358] Newfoundland and Labrador *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 Section 2(mm).

[359] Nova Scotia *Environment Act*, S.N.S. 1994-95, c. 1 Section 3(az).

[360] Ontario, *Environmental Assessment Act*, R.S.O. 1990, c. E.18 Section 1(1).

[361] Prince Edward Island, *Environmental Protection Act*, R.S.P.E.I. 1988, c. E-9. Section 1(p).

[362] Strategic Environmental Assessment is discussed further in a later section of this Chapter.

[363] Newfoundland and Labrador, *supra* note 341, s. 2(m)(iii).

[364] Newfoundland and Labrador, *Ibid*, s. 2(m)(iv); Ontario, *supra* note 343, s. 1(1)(d).

[365] Ontario, *Ibid*, s. 1(1)(c); Newfoundland and Labrador, *Ibid*, s. 2(m)(v). Note that socio-economic considerations are included as indirect effects resulting from biophysical effects in some jurisdictions.

2. Public Participation

[366] Jason Unger, *A Guide to Public Participation in Environmental Decision-Making in Alberta*, (Environmental Law Centre, 2009) online: http://elc.ab.ca/Content_Files/Files/ProcessGuide-webcopy-revisedDL.pdf.

[367] Unger, *Ibid.*

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[368] Unger, *Ibid.*

[369] Deborah Oughton, "Public Participation - Potential and Pitfalls" (2008) 19 *Energy & Environment* No. 3/4, at 489.

[370] In this Report "stakeholder" refers to the range of individuals involved in environmental assessment and licensing processes such as the public, proponents, Aboriginal communities, industry groups, government departments, etc that have an interest in or may be affected by a proposed development or strategic undertaking.

[371] Oughton, *supra* note 369.

[372] Meinhard Doelle & A. John Sinclair, "Time for a new approach to public participation in EA: Promoting cooperation and consensus for sustainability" (2006) 26 *Environmental Impact Assessment Review* at 186

[373]Doelle & Sinclair, *Ibid.*

[374] John Sinclair and Alan Diduck, *Public Participation in Canadian Environmental Assessment: Enduring Challenges and Future Directios* in Kevin S. Hanna, eds. *Environmental Impact Assessment: Practice and Participation,* 2nd ed. (2009: Oxford University Press) at 59.

[375] For a more comprehensive list of benefits, please see Sinclair and Diduck, *Ibid*, at 59-60.

[376] The different means of public engagement discussed in this section do not include those that are used by proponents in the production of EAP and EAR. It should be noted that a wide range of public engagement opportunities, including those designed and undertaken by proponents, are often necessary to create a system of meaningful two-way engagement.

[377] Manitoba, *supra* note 5, s.5. This provision appears to be rarely used in the context of environmental assessments. Although not specified, this provision should permit the Minister to appoint members of the public to advisory committees as appropriate.

[378] *Ibid,* s. 3(3).

[379] *Ibid,* s. 6(5)(d).

[380] Carver et al., *supra* note 10, at 37.

[381] Manitoba, *supra* note 5, s. 3(3).

[382] *Auditor General Act*, RSC, 1983, C. A-17 s. 22.

[383] John Sinclair et al, "Environmental impact assessment process substitution: experiences of public participants" (2012) *Impact Assessment and Project Appraisal* 30:2, at 87.

[384] Brenda Heelan Powell, *supra* note 10 at 34.

[385] Ontario, *Environmental Bill of Rights, 1993,* S.O. 1993, c. 28.

[386] For example, see: Clean Environment Commission, *Process Guidelines Respecting Public Hearings*, 2012, online: http://www.cecmanitoba.ca/resource/file/Procedures%20Manual%202012(2).pdf.

[387] CEAA, *Introduction to the Canadian Environment Assessment Act, 2012*, online: http://www.ceaa-acee.gc.ca/014/descriptions/description017-eng.shtm.

[388] L.G. Smith, "Mechanisms for public participation at a normative planning level in Canada" (1982) *Canadian Public Policy* 8:4, at 561-2: see Table 1.

[389] Manitoba, *supra* note 5, s. 10(4)(a); 11(8)(a); 12(4)(a).

[390] Manitoba Conservation, *supra* note 249.

[391] Manitoba, *supra* note 5, s. 12.0.0(1), 12.0.0(2).

[392] The length of this comment period varies between projects depending on "the time of year, complexity, logistics, and level of interest or concern." [MB Conservation Info Bulletin (2009), at 2]. If the Act requires the Minister, the Director or the CEC to give a person notice of a decision, written reasons, or for another reason established in the Act, the notice or reasons are to be provided by registered mail or personal delivery [s. 2 – *Notice and Reporting Regulation* M. R.126/10].

[393] For more information about participation in CEC hearings, see: CEC, *Get Involved*, online: http://www.cecmanitoba.ca/participation/.

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[394] (1994) 94 Man. R. (2d) 188.

[395] See Manitoba, *supra* note 5, s. 10(4) and 10(6).

[396] *Supra* note 394, para 25.

[397] Alberta, *supra* note 329, s. 44(1); 73(1); 91(1).

[398] Manitoba, *supra* note 5, s. 12(4).

[399] (1998) 129 Man R (2d) 71.

[400] *Ibid*, at 4.

[401] While Justice Kroft and Justice Helper concurred with Twaddle, they were not necessarily in agreement that the notice given was sufficient. Instead, their concurrence was based on a determination that the director's conduct was not unfair, biased, or arbitrary and that therefore there was no reason to interfere with the discretion exercised by the trial judge. Kroft and Helper both found that the wording of the notice provision (s.11(8)) suffered from ambiguity.

[402] Canada, *supra* note 6, ss. 78(2).

[403] See Canada, Nunavut *Planning and Project Assessment Act*, R.S.C., 1985, c. 31 (4th Supp.), s. 37.

[404] For example, under South African environmental assessment law, special provisions are provided for persons unable to understand the content of a notice for the reasons of illiteracy, disability or other disadvantages. These special provisions mandate that where the person is unable to understand the content of the notice, alternative means of notifying the owner or person in control of the land must be agreed on with the regulatory authority. [*Environmental Impact Assessment EIA Regulations* (Government Notice R.543 in Government Gazette 33306 of 18 June 2010) South Africa, ss 15(1), (2).]

[405] Sinclair and Diduck, *supra* note 374 at 62-64.

[406] *Participant Assistance Regulation* M.R. 125/91, s. 2(1).

[407] *Ibid*, s. 4.

[408] See *Ibid*, s. 8(2), 8(3), 9(4).

[409] Participant comments include: "Public participation should be welcomed throughout the entire process"; "The value of public participation is to offer opportunities throughout the process where concerns can be raised, identified and potential mitigation options may be assessed. Each project has unique and individual considerations so it is not possible to suggest that certain points offer lesser or better opportunities"; "Public participation would be more useful it if was earlier, but it has to be balanced against the industry's interest in not disclosing its private business too early. Having public input on the guidelines, especially for more contentious projects, is a good idea."

[410] COSDI, *supra* note 8, at 11. Participant comments include: "One approach might be to have a panel process where a panel consisting of the regulator, a CEC member and others would act as a sounding board. This would make the public feel more involved and give them an opportunity to ask questions. This could reduce the negativity toward a project, as people take more ownership over the issues. This would have to happen sometime in the middle of the process. It would be like an open house but with the regulator and a member of the CEC."; "The benefits of public engagement can often strengthened most powerfully by providing better venues for addressing fundamental concerns and aspirations."

[411] Alan Diduck, Patricia Fitzpatrick, and John Sinclair, *Improving the Hearings Process: A Report to the Manitoba Clean Environment Commission,* 2001, online: http://www.cecmanitoba.ca/resource/reports/Commissioned-Reports-2001-2002-Improving_Hearings_Process_Report_Manitoba_CEC.pdf.

[412] See COSDI, *supra* note 8, at 12.

[413] Participant comments include: "There needs to be better guidance for proponents – clearly a need for more independent collection of participant concerns through interactive forums."; "Publishing guidelines on effective public engagement is a good idea, however, it must be indicated what the purpose of public engagement is."; "Provincial expectations in relation tor public participation should be articulated in guidance documents that provide flexibility to address different circumstances and that can be updated as best practices evolve."

[414] For example, participant comments include: "The conservation website is difficult to navigate, omits important current data and deletes materials too soon. There is a need to expand hard copy registries in key provincial

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centres."; "The Act calls for publication of notice in the newspaper, this is no longer appropriate. We're in a different era and the process for publication no longer makes sense. Many people read newspapers online now, and announcements are not included in online editions."

[415] COSDI made extensive recommendations for the improvement of public registries including the expansion of the public registry system to include planning and resource allocation activities; improvement of the public's access outside of normal working hours; standardization of registry content to ensure consistent inclusion of project proposals, regulatory guidance to proponents, TAC minutes, departmental and public comments, communications between proponents and decision-makers, assessment documents, license, notices of alteration, monitoring reports, and compliance information; specific requirements for planners and proponents to provide sufficient copies of documents for all members of the public including those in remote areas; and the development of user-friendly, plain language summaries of technical documents. [*supra* note 8, at 15/16]

[416] Participant comments include: "There should be an explanation of how the Minister decides if a CEC hearing is needed. Legislated criteria would help"; "There is very little trust from the critical public that their input is heard or acted upon in large part because of who is running PP and how."

[417] Under s. 10(10); 11(13); 12(8), if the Minister has requested a CEC hearing and the recommendations of the CEC (which it is assumed will include the input of the public) are not included in the final licence, the director/minister must provide written reasons for the decision to the proponent, the commission, and the public registry. This at least provides some explanation to the public if their input is excluded from final licensing decisions after a hearing has been held.

3. Triggering an Environmental Assessment

[418] Manitoba, *supra* note 245.

[419] Alberta, *supra* note 329.

[420] *British Columbia Prescribed Projects Regulation* B.C. Reg. 370/2002.

[421] Kenton Lobe, *Environmental Assessment: Manitoba Approaches*, Chapter 16 (at 293-294) in Kevin S. Hanna, eds. *Environmental Impact Assessment: Practice and Participation, 2nd ed.* (2009: Oxford University Press), at 349.

[422] Alberta, *Alberta's Environmental Assessment Process*, 2013, online: http://environment.gov.ab.ca/info/library/6964.pdf.

[423] Alberta, *supra* note 329.

[424] As identified by participants, such activities include: hydraulic fracking, peat mining and mineral exploration.

[425] *Campbell Soup, supra* note 247.

[426] See e.g. British Columbia, *supra* note 333; Alberta, *supra* note 329; Newfoundland and Labrador, *supra* note 358; Nova Scotia, *supra* note 359.

4. Environment Act Proposals

[427] In this section, the term "project" is used to mean a development, undertaking, activity or action that is being proposed.

[428] This usually involves a discussion of the proposed construction and operation schedules, along with other construction and operation specifications.

[429] Wood, *supra* note 1, at 9.

[430] Nova Scotia, *Environmental Assessment Regulations*, s. 19(1)(xiii)-(xv).

[431] For example, *CEAA, 2012* and B.C.'s *Environmental Assessment Act* requires a "project description"; Alberta's *Environmental Protection and Enhancement Act* requires a "disclosure document"; Nova Scotia's *Environment Act* requires a "registration document"; P.E.I Environmental Protection Act requires a "proposal"; Saskatchewan's *Environmental Assessment Act* requires an "application".

[432] For example, **Federal Process**: *CEAA, 2012, supra* note 6, ss. 8.(1), *Prescribed Information for the Description of a Designated Project Regulations*, SOR/2012-147; *Guide to Preparing a Description of Designated Project under the Canadian Environmental Assessment Act, 2012*; **Alberta:** Alberta, *supra* note 329, s. 44(1), 44(2 and 3),

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Environmental Assessment (Mandatory and Exempted Activities) Regulation 111/93, *Environmental Assessment Regulation* 0112/1993; **Nova Scotia:** *supra* note 359, s. 33, *Environmental Assessment Regulations*. S.N.S. 1994-95, c. 1, Proponent's Guide to Environmental Assessment, 2014; **British Columbia:** Guidelines for Preparing a Project Description for an Environmental Assessment in British Columbia, Environmental Assessment Office, 2013, British Columbia, *supra* note 333, s.1.

[433] Manitoba, *supra* note 251.

[434] Government of Manitoba, *supra* note 253. This document provides a description of what is required in the report(s) supporting the EAP, and the quantity and types of copies required.

[435] See Manitoba, *Information Bulletin - Environment Act Proposals for Municipal Water Supply Systems - Supplementary Guidelines*, (Conservation and Water Stewardship, 2009), online: http://www.gov.mb.ca/conservation/eal/publs/info_eap_water.pdf; Manitoba, *Information Bulletin - Environment Act Proposals for Crop Protection Chemical Warehouses - Supplementary Guidelines*, (Conservation and Water Stewardship, 2009), online: http://www.gov.mb.ca/conservation/eal/publs/info_eap_chemwhs.pdf; Manitoba, *Information Bulletin - Environment Act Proposals for Wastewater Treatment Facilities - Supplementary Guidelines*, (Conservation and Water Stewardship, 2009), online: http://www.gov.mb.ca/conservation/eal/publs/info_eap_wwtf.pdf

[436] Nova Scotia, *supra* note 359, s. 33; *supra* note 430, s. 9(1).

[437] Manitoba, *supra* note 252. These requirements are discussed in greater detail in the Information Bulletin - *Environment Act Proposal Report Guidelines* [*supra* note 253].

[438] *Ibid*, s.1.1(a).

[439] *Ibid*, s.1.1(b),(c),(d).

[440] *Ibid*, s.1.1(e),(f).

[441] *Ibid*, s.1.1(g),(h).

[442] *Ibid*, s.1.1(i).

[443] *Ibid*, s.1.1(j). Such effects include, but are not necessarily limited to: (i) type, quantity and concentration of pollutants to be released into the air, water or land; (ii) effects on wildlife; (iii) effects on fisheries; (iv) effects on surface water and groundwater; (v) forestry related effects; (vi) effects on heritage resources; (vii) socio-economic implications resulting from the environmental effects.

[444] *Ibid*, s.1.1(k).

[445] *Ibid*, s. 1.1(l).

[446] Nova Scotia, *supra* note 359, s. 9(1).

[447] *Prescribed Information for the Description of a Designated Project Regulations*, SOR/2012-147, s. 19.

[448] Environmental Approvals, *supra* note 242.

[449] The TAC consists of provincial and federal government specialists who are able to provide technical expertise (*supra* note 249, at 2).

[450] Detailed in the sense of more specific – not necessarily the depth to which this info is addressed – ie introduction, identification of the issues, discussion of things that are known issues but need more study, concerns of the public. Should not be same level as EIS, but provide basic information about what proponent thinks should be addressed in an EIS.

[451] See: Canada, Guide to Preparing a Description of Designated Project under the *Canadian Environmental Assessment Act, 2012*, (CEAA, 2014) online: https://www.ceaa-acee.gc.ca/default.asp?lang=en&n=3CA9CEE5-1; See also: https://www.ceaa-acee.gc.ca/default.asp?lang=en&n=63D3D025-1

[452] Canada, *supra* note 6, ss. 32.(1).

5. Review of an Environment Act Proposal

[453] Manitoba *supra* note 5, s. 10(4); s. 11(8); s. 12(4). See also: Hanna, *supra* note 195, at 9; Wood, *supra* note 1 at 140.

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[454] The Technical Advisory Committee, established under section 5 of the Act, consists of provincial and federal government specialists who are able to provide technical expertise.

[455] Hanna, *supra* note 195, at 9; Wood, *supra* note 1 at 140.

[456] For example, the Act allows the Director to consider a Class 1 development as a Class 2 development [s. 10(5)] and the Minister may consider a Class 2 development as a Class 3 development [s. 11(8)].

[457] Hanna, *supra* note 195 at 10.

[458] Wood, *supra* note 1 at 140.

[459] Wood, *Ibid.*

[460] For example, see: British Columbia, *supra* note 333, s. 5, 6, 7, 10; *Reviewable Projects Regulation*, BC Reg. 370/2002. Alberta, *supra* note 329, s.41,43 to 47; *Preparing Disclosure Documents for Environmental Assessment Screening*, 2010; *Environmental Assessment (Mandatory and Exempted Activities) Regulation* A.R. 111/1993.

[461] Government of Manitoba, Government of Manitoba, *Environment Act Consultation: The Road to Enhancing Environmental Protection in Manitoba*, 2014, at 2.

[462] COSDI, *supra* note 8, at 34. See N), O), P).

[463] "The TAC has always been integral to the environmental assessment and licensing process; however, the current act does not specifically refer to the TAC. It is important to ensure permanency of the TAC within the act. As such, we propose to formalize the role of the TAC by including it in the act." [Government of Manitoba, *supra* note 461, at 6].

[464] Government of Manitoba, *Ibid.*

6. Requirements for Further Information

[465] For example, Public Registry File 5709.00 – City of Winnipeg – Southwest Rapid Transit Corridor – Stage 2: Information Request, July 31, 2014, online: http://www.gov.mb.ca/conservation/eal/registries/5709citywpgrapidtransit/information.request.pdf; Response to Information Request, July 31, 14, 2014, online: http://www.gov.mb.ca/conservation/eal/registries/5709citywpgrapidtransit/response.to.information.request.pdf.

[466] For **Class 1 developments**, the Director can require: additional information as the director deems necessary, issue guidelines and instructions for the proponent to conduct further studies, detailed plans for environmental protection and management [s. 10(6)(a)-(c)]; for **Class 2 developments**, the Director can require: additional information, issue guidelines and instructions for the assessment and require the proponent to carry out public consultation, require the proponent to prepare and submit to the director an assessment report to include such studies, research, data gathering and analysis or monitoring, alternatives to the proposed development processes and locations, and the details of proposed environmental management practices to deal with the issues [s. 11(8)(a)-(c)]; for **Class 3 developments**, the Minister, in consultation with the Interdepartmental Planning Board, can require: additional relevant information, issue guidelines and instructions for the assessment and require the proponent to carry out public consultation, require the proponent to prepare and submit an assessment report to include such studies, research, data gathering and analysis or monitoring, alternatives to the proposed development processes and locations, and the details of proposed environmental management practices to deal with the issues as the minister deems necessary [s. 12(5)(a)-(c)].

[467] See Manitoba, *supra* note 249, at 2.

[468] For example, see *Keeyask Generation Project: Notice of Environment Act Proposal, Public Comment Period and Federal Funding Available*, 2012, online: http://www.gov.mb.ca/conservation/eal/registries/5550keeyask/advertisement.pdf; Manitoba Conservation, *Notice of Environment Act Proposal: Manitoba Hydro Bi-Pole III Transmission Project: A Major Reliability Initiative (File: 5433.00)*, online: http://www.gov.mb.ca/conservation/eal/registries/5433bipole/advertisement.pdf.

[469] For example: Keeyask Hydropower Limited Partnership, *Keeyask Generation Project: Scoping Document*, 2011, online: http://www.gov.mb.ca/conservation/eal/registries/5550keeyask/scope_doc.pdf ; Manitoba Hydro, *Bipole III Transmission Project: A Major Reliability Improvement Initiative: Environmental Assessment Scoping Document*, 2010, online: http://www.gov.mb.ca/conservation/eal/registries/5433bipole/scopedoc.pdf.

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[470] For example see: Government of Manitoba, *Guidelines for the Preparation of an Environmental Impact Statement for the Louisiana Pacific Canada Ltd. Twenty Year Forest Management Plan*, 2010, online: http://www.gov.mb.ca/conservation/eal/registries/3893lp/eis_guide_final.pdf ; Government of Manitoba, *Wuskwatim Generation & Transmission Projects – EIS Guidelines: Consultation on Draft Guidelines for the Preparation of the Environmental Impact Statement – What You Told Us*, 2002, online: http://www.gov.mb.ca/conservation/eal/registries/4724_5wuskwatim/consultation.html ; Government of Manitoba, *Guidelines for the Preparation of the Environmental Impact Statement*, 2002, online: http://www.gov.mb.ca/conservation/eal/registries/4724_5wuskwatim/wuskwatimgenstn-guidelines.html

[471] For example, Public Registry File 5709.00 – City of Winnipeg – Southwest Rapid Transit Corridor – Stage 2: Information Request, July 31, 2014, online: http://www.gov.mb.ca/conservation/eal/registries/5709citywpgrapidtransit/information.request.pdf; Response to Information Request, July 31, 14, 2014, online: http://www.gov.mb.ca/conservation/eal/registries/5709citywpgrapidtransit/response.to.information.request.pdf

[472] In environmental assessment baseline information is information on the environment that exists prior to the development. It is also called the environmental setting or pre-project conditions. Effects or changes to the environment caused by the project are measured against the baseline information. See definition of "baseline data" in Appendix A.

[473] Hanna, *supra* note 195 at 10.

[474] Wood, *supra* note 1, at 159/60.

[475] Such delays are common in Manitoba's process, particularly during public hearing processes. For example, such delays occurred during the public hearings for the Bipole III Generating Station and Keeyask Generating Station projects.

[476] Wood, *supra* note 1, at 160.

[477] Hanna, *supra* note 195 at 10.

[478] Douglas Baker and Eric Rapaport, *The Science of Assessment: Identifying and Predicting Environmental Impacts*, in Hanna, eds. *supra* note 195 at 34-35.

[479] Wood, *supra* note 1, at 161.

[480] UN University Online Learning, RMIT University & UN Environmental Programme, *Environmental Impact Assessment: Course Module* at Chapter 3-2 "What is Public Involvement?" online: EIA Open Educational Resource http://eia.unu.edu/course/index.html%3Fpage_id=129.html

[481] For example, "terms of reference" are required in Alberta, Ontario, and Nova Scotia. Manitoba can require the production of "guidelines and instructions for the assessment" [s. 11(9), 12(5)]. Under *CEAA, 2012*, the "scope of the factors to be taken into account" is determined by the respective government authority.

[482] Wood, *supra* note 1, at 162.

[483] *CEAA, 2012*, *supra* note 6, ss. 19(2).

[484] Alberta, *supra* note 329, s. 48(1).

[485] Alberta, *Standardized Terms of Reference*, Environmental Assessment Program, 2013.

[486] British Columbia, *supra* note 333, s. 11; *Environmental Assessment Office Users Guide*, 2011; *Application Information Requirements Template*, 2012.

[487] This can also be dealt with by including a step in the CEC part of the environmental assessment process where adequacy of the available information including the environmental assessment report is decided on. If not adequate, the report would go back to the proponent for completion. *CEAA, 2012* has this type of process for panel reviews.

[488] Hanna, *supra* note 195, at 9; Wood, *supra* note 1. For the purposes of this exercise the term environmental assessment includes other related terms namely assessment, environmental impact assessment and environmental impact statement.

[489] For example: Public Registry File 5731.00 – R.M. of Wallace – Wastewater Treatment Lagoon – this file contains an "Environment Act Proposal" that contains information about potential impacts and mitigation plans; Public Registry File 5728.00 Coco Paving Canada – Russell Redi-Mix Concrete – Portable Asphalt Plant: this file

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contains an "Environment Act Proposal" that contains information about potential impacts and mitigation plans; Public Registry File 5740.00 – Exner E-Waste Processing Inc. – E-Waste Processing Facility: What is listed as an EAP in the Registry is actually titled as an "Environmental Assessment (EA) Report" – the EAP and environmental assessment report have been combined into one document; Public Registry File 5550.00 - Keeyask Hydropower Limited Partnership – Keeyask Generation Project: this file contains an "Environment Act Proposal Form" and a separate "Environmental Impact Statement" plus supplemental filings.

[490] Wood, *supra* note 1 at 92/93.

[491] Douglas Baker and Eric Rapaport, *supra* note 478, at 33.

[492] Wood, *supra* note 1, at 6-7; Hanna, *supra* note 195, at 3-15; Judith Petts, eds., *Handbook of Environmental Impact Assessment*, (1999: Blackwell Science Ltd.), 5-7.

[493] For example, Engineers, Biologists, and Consultants.

[494] Wood, *supra* note 1, at 176.

[495] Manitoba, *supra* note 5, s. 11(9), s.12 (5).

[496] Hanna, *supra* note 195, at 11.

[497] Wood, *supra* note 1, at 176.

[498] For example, the terms "environment", "assessment", "effect", "impact" are defined in Canadian environmental assessment legislation in a variety of ways or are not defined at all.

[499] *EPEA*, *supra* note 329, s. 49(a).

[500] This can include Alternative means of carrying out the project and Alternatives to the project, including the option of not undertaking the project at all - *EPEA*, *Ibid*, s. 49(b)(h); *CEAA, 2012*, *supra* note 6, ss. 19(1)(g).

[501] *CEAA, 2012*, *Ibid*, ss. 19(1)(c); *EPEA*, *Ibid*, s. 49(l); BC, *supra* note 333, s. 11(2)(f).

[502] *CEAA, 2012*, *Ibid*, s. 5(1)(c), 19(3) ["may"]; Yukon, *supra* note 331, s.2, 39; NWT, *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25.

[503] *CEAA, 2012*, *Ibid*, s. 19(1)(a), *EPEA*, *supra* note 396, s. 49(d); BC, *supra* note 333, s. 11(2)(b).

[504] Québec, *Environment Quality Act*, s. 31(t), s. 31.76, s. 31.88, 31.101; Alberta, *EPEA*, *Ibid*, s. 2, 5, 6, 40(a).

[505] *CEAA, 2012*, *supra* note 6, s. 19(1)(j); *EPEA*, *Ibid*, s. 49(o).

[506] *CEAA, 2012*, *Ibid*, s. 19(1) – factors include: (a) the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out; (b) the significance of the effects referred to in paragraph (a); (c) comments from the public — or, with respect to a designated project that requires that a certificate be issued in accordance with an order made under section 54 of the National Energy Board Act, any interested party — that are received in accordance with this Act; (d) mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project; (e) the requirements of the follow-up program in respect of the designated project; (f) the purpose of the designated project; (g) alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means; (h) any change to the designated project that may be caused by the environment; (i) the results of any relevant study conducted by a committee established under section 73 or 74; and (j) any other matter relevant to the environmental assessment that the responsible authority, or — if the environmental assessment is referred to a review panel — the Minister, requires to be taken into account. The scope of these factors is determined by the responsible authority or the Minister under s. 19(2).

[507] *EPEA*, *supra* note 329, s. 48(1), 49.

[508] British Columbia, *Environmental Assessment Office Users Guide*, 2011, online: http://www.eao.gov.bc.ca/pdf/EAO_User_Guide%20Final-Mar2011.pdf; British Columbia, *Application Information Requirements Template*, 2012, online: http://www.eao.gov.bc.ca/pdf/AIR_Template_27May2013.doc.pdf ; British Columbia, *Environmental Assessment Office Guideline for the Selection of Valued Components and Assessment of Potential Effects*, 2013, online: http://www.eao.gov.bc.ca/pdf/EAO_Valued_Components_Guideline_2013_09_09.pdf ; British Columbia,

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Environmental Assessment Office, *Fact Sheet Valued Component Guideline*, 2013, online: http://www.eao.gov.bc.ca/pdf/Fact_Sheet_Valued_Components_Guideline_2013_07_30.pdf

[509] Alberta, *Environmental Assessment Program: Alberta's Environmental Assessment Process*, 2013, online: http://environment.gov.ab.ca/info/library/6964.pdf ; Alberta, *Environmental Assessment Program: Standardized Terms of Reference*, (2013), online: http://environment.gov.ab.ca/info/library/8126.pdf ; Alberta, *Guide to Preparing Environmental Impact Assessment Reports in Alberta* (2013), online: http://esrd.alberta.ca/lands-forests/land-industrial/programs-and-services/environmental-assessment/documents/8127.pdf

[510] Prince Edward Island, *Environmental Impact Assessment Guidelines*, 2010; See Prince Edward Island, *supra* note 361, s. 2 and 3 for the legislative requirements.

[511] Nova Scotia, *supra* note 430, s. 19(1).

[512] Nova Scotia, *A proponent's Guide to Environmental Assessment*, 2014; Nova Scotia, *Environmental Assessment: Balancing Environmental Protection with Economic Growth*, online: https://www.novascotia.ca/nse/ea/docs/EnviroAssessment.pdf.

[513] Ontario, *Code of Practice for Preparing and Reviewing Terms of Reference for Environmental Assessments in Ontario*, 2014; Ontario, *Code of Practice for Preparing and Reviewing Environmental Assessments in Ontario*, 2014.

[514] Manitoba, *supra* note 5, s. 1(2).

[515] *Ibid*, s.11(9); 12(5)

[516] The Act gives the Director/Minister authority to require the preparation of an environmental assessment report only for Class 2 and 3 Developments. The content of such a report may include information about studies, research, data gathering and analysis or monitoring, and alternatives to the proposed development processes and locations. [*Ibid*, s.11(9)(c), 12(5)(c)].

[517] Wood, *supra* note 1, at 93.

[518] Ontario, *Code of Practice: Preparing and Reviewing Terms of Reference for Environmental Assessments in Ontario*, 2014; Alberta, *Guide to Preparing Environmental Assessment Reports in Alberta*, 2013; British Columbia, Environmental Assessment Office, *Application Information Requirements Template*, 2013.

[519] *CEAA, 2012*, *supra* note 6, s. 19(1)

7. Decision-making under the Act

[520] Wood, *supra* note 1, at 221.

[521] Wood, *Ibid*.

[522] See Wood, *Ibid*, at 221-224.

[523] This is the stage in Manitoba's environmental assessment and licensing process at which the decision-making authority approves or rejects a development proposal. Licensing conditions are imposed on approved developments. In Manitoba, the Director has decision-making authority over Class 1 and 2 developments. The Minister makes decisions for Class 3 developments.

[524] Such decisions include: whether a particular activity constitutes a development for the purpose of assessment, whether to conduct a public hearing, whether to require an environmental impact statement and what the contents of the EIS should be, whether to permit an alteration to a license without further assessment, and, finally, whether to issue a licence.

[525] Section 12.0.2 also refers to the consideration of other potential environmental impacts of the proposed development. It is not clear whether the term "considering a proposal" encompasses all decisions with respect to the environmental assessment and licensing process.

[526] These factors include: the environmental effects of the project, the significance of the effects, comments from the public, mitigation measures, the purpose of the project, and several others.

[527] British Columbia, *supra* note 333, s. 17(3).

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[528] For example, under section 68(1) of the Alberta *Environmental Protection and Enhancement Act*, the Director must consider factors such as the location, size and nature of the project and public concerns about the project in deciding whether an environmental assessment should take place for a non-mandatory activity [*supra* note 329].

In Ontario, both the Tribunal and the minister must consider the purpose of the Act, the approved Terms of Reference for the environmental assessment, the environmental assessment itself, the Ministry review of the environmental assessment, comments submitted on the environmental assessment and the Ministry's review of the environmental assessment, and a mediators' report if available when deciding whether to approve an application [See sections 9 and 9.1 of the *Environmental Assessment Act, supra* note 360].

In Nova Scotia, the minister must consider the factors listed in section 12 of the Regulations when deciding whether to approve or reject an undertaking. These factors include the location of the undertaking, the sensitivity of the surrounding area, concerns expressed by the public and by Aboriginal people, the potential and known adverse effects of the undertaking.

[529] See Nova Scotia, *supra* note 359, s. 9(3) and Saskatchewan, *supra* note 357, s. 15(1)(2).

[530] See *Roncarelli v Duplessis*, [1959] SCR 121; *Baker v Canada*, [1999] 2 SCR 817.

8. Appeals

[531] See Robert Gibson, "Sustainability Assessment: Basic Components of a Practical Approach" (2006) 24 *Impact Assessment and Project Appraisal* 170 at 179, 180.

[532] Sections 27 and 28 of the Act allows any person affected by certain directorial or ministerial decisions to file an appeal. Director's decisions are appealed to the minister, and minister's decisions are appealed to the Lieutenant-Governor-in-Council.

[533] For example, the Alberta Environmental Appeals Board hears appeals from decisions made under the *Environmental Protection and Enhancement Act*, s. 90. See http://www.eab.gov.ab.ca/ for more information. In Ontario, The Environmental Review Tribunal (ERT) resolves applications and appeals under the following statutes: *Clean Water Act, Consolidated Hearings Act, Environmental Assessment Act, Environmental Bill of Rights, Environmental Protection Act, Niagara Escarpment Planning and Development Act* (NEPDA), *Nutrient Management Act, Ontario Water Resources Act, Pesticides Act, Safe Drinking Water Act* and the *Toxics Reduction Act*. See http://www.ert.gov.on.ca/english/about/index.htm for more information about the ERT.

[534] Section 9.1(3) of Ontario's *Environmental Assessment Act* requires the Tribunal to consider the: Purpose of the Act; terms of reference for the environmental assessment; environmental assessment results; Ministry review of the environmental assessment; any comments submitted to the Department; any mediators reports that have been submitted to the Minister.

[535] OICs issued before 2007 are not available on the Government of Manitoba website. See http://oic.gov.mb.ca/oic/ordersincouncil.aspx. Over the last eight years, 24 OICs have been issued in relation to appeals made under *The Environment Act* s. 27 and 28. Of these appeals, 18 were dismissed, and 7 resulted in a variation of the Licence. One appeal, [OIC 00338/2009] involved review by the CEC, which found no reason to deny the licence, which resulted in the appeal being dismissed. The proponent of the development involved was 6539963 Canada Ltd. Industrial Metals (2006) LP, and the licence in question was No. 2856 issued December 22, 2008.

[536] Nova Scotia, *supra* note 359, s.10(1)(d).

[537] Alberta, *EPEA*, *supra* note 329, s. 98; Ontario, *supra* note 360, s. 11.1(4).

[538] Section 30 of the Act states: "An appeal filed under sections 26, 27 or 28 does not suspend the decision appealed against; but the minister may suspend the operation of the decision, in whole or in part, until the appeal is disposed of."

[539] According to section 30 of the Act, An appeal filed under sections 26, 27 or 28 does not suspend the decision appealed against; but the minister may suspend the operation of the decision, in whole or in part, until the appeal is disposed of.

9. Monitoring, Compliance Follow-up and Enforcement

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[540] Wood, *supra* note 1, at 241; Hanna, *supra* note 195, at 13. Other aspects of follow-up include: the identification of unforeseen environmental effects and the evaluation of the effectiveness of mitigation measures.

[541] Wood, *Ibid.*

[542] Wood, *Ibid,* at 240.

[543] Wood, *Ibid,* at 243.

[544] Wood, *Ibid,* at 241.

[545] For example see: Manitoba Ombudsman, *Report on the Licensing and Enforcement Practices of Manitoba Water Stewardship*, 2008; Manitoba Conservation, *supra* note 9.

[546] There are different kinds of monitoring, for example, baseline, environmental and compliance monitoring. See Appendix A – "monitoring".

[547] For Class 1 developments under Manitoba's *Environment Act*, the director may require from the proponent detailed plans for environmental protection and management (s.10(6)). For Class 2 and 3 developments, the director may require the proponent to prepare and submit an assessment report to include such studies, research, data gathering and analysis or monitoring, alternatives to the proposed development processes and locations, and the details of proposed environmental management practices to deal with the issues (s.11(9), s. 12(5)(c)). The *Licensing Procedures Regulation* requires that a proposal filed under the Act include a description of the proposed environmental management practices to be employed to prevent or mitigate adverse implications from the impacts of the development, having regard to, where applicable: containment, handling, monitoring, storage, treatment and final disposal of pollutants; conservation and protection of natural or heritage resources; environmental restoration and rehabilitation of the site upon decommissioning, and protection of environmental health. The *Information Bulletin- Environment Act Proposal Report Guidelines* suggests that the main environmental assessment report typically contains, among other items, follow-up plans, including monitoring and reporting.

[548] Alberta, *supra* note 329.

[549] Nova Scotia, *supra* note 359.

[550] *Ibid.*

[551] Newfoundland and Labrador, *supra* note 358, s. 57(h).

[552] *Ibid*, s. 69.

[553] British Columbia, *Environmental Assessment Office User Guide,* 2009, at 25, 29.

[554] Section 20 of Manitoba's Act gives environment officers the power to inspect premises and materials to determine compliance with the Act, or a license issued under it. The Department of Conservation and Water Stewardship has a dedicated Environmental Compliance and Enforcement Branch which is responsible for inspections under section 20.

[555] For example see: Canada, *2014 Fall Report of the Commissioner of the Environment and Sustainable Development: Chapter 4 – Implementation of the Canadian Environmental Assessment act, 2012,* 2014; Manitoba Ombudsman, *supra* note 525; Manitoba Conservation, *supra* note 9.

[556] *Supra* note 5, s 12(2), 19(1), 31.

[557] Government of Manitoba, *supra* note 243.

[558] Inspection is a very important part of follow-up. Inspections can be done by the proponent, and/or regulators. Inspection reports provide information about how the licensing requirements are being implemented.

[559] British Columbia, *supra* note 333, s. 36.

[560] *Ibid*, s. 42.

[561] *Ibid*, s. 39.

[562] Alberta, *EPEA*, *supra* note 329, s. 196(1).

[563] *Ibid*, s. 70(3).

[564] *Ibid*, s. 217

[565] *Ibid*, s. 219.

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[566] Ontario, *supra* note 360, s.9(1).

[567] *Ibid*, s. 5(5)

[568] *Ibid*. s. 28(a).

[569] *CEAA, 2012*, *supra* note 6, s. 96.

[570] Ontario, *supra* note 360, s. 34.

[571] *CEAA, 2012*, *supra* note 6, s. 98.

[572] Nova Scotia, *supra* note 359, s. 115(3).

[573] Newfoundland and Labrador, *supra* note 358, s. 91(1).

[574] *Ibid*, s. 93.

[575] *Ibid*, s. 111(1)(rr).

[576] See *Air Pollution Control Regulations*, 2004, 39/04, s. 8(1).

[577] Nova Scotia, *supra* note 359, s. 115(1).

[578] *Ibid*. s. 70(1)(a).

[579] S.C. 2009, c. 14, s. 126

[580] *Ibid*, s. 2, "Environment Act".

[581] Alta Reg 23/2003, Schedule 1. Such sections include: 61, 67(1), 75(1), 76, 79, 83.1, 88, 88.1, 88.2, 108(2), 109(2), 110(1), (2), 111, 112, 137, 138, 148, 149, 155, 157, 163(1), (3), 169, 170, 173, 176, 178, 179(1), (2), 180, 181, 182, 188(1), 191, 192, 209, 227(b), (c), (e), (g), (i), 251.

[582] Such statutes include: *The Workplace Safety and Health Act*, *The Consumer Protection Act*, *The Securities Act* and *The Employment Standards Code*.

[583] For example see Manitoba Ombudsman, *supra* note 556.

[584] S.C. 1992, c. 37, ss. 71.

[585] Ontario, *supra* note 360, s. 31(1).

[586] For example, the Bipole III license requires the proponent to maintain a website containing all of the information related to monitoring and assessing environmental mitigation and management.

[587] *CEAA, 2012*, *supra* note 6, s. 35(1)(b).

[588] There are several sources that prescribe best practices for environmental monitoring, including standards developed by the International Standards Office (ISO 14000), and many industry-specific guidelines.

[589] For example, see http://keeyask.com/wp/the-project.

[590] For example see: Manitoba Conservation, *supra* note 9.

[591] Manitoba, *supra* note 461, at 9.

[592] Manitoba, *Ibid*.

[593] Under *The Environment Act*, the Minister is required to provide "opportunity for public consultation and seek advice and recommendations regarding the proposed regulations or amendments", "in the formulation or substantive review of regulations incorporating environmental standards, limits, terms or conditions on developments under this Act", "except in circumstances considered by the minister to be of an emergency nature." [*supra* note 5, s. 41(2)].

[594] Strategic environmental assessment is closely related to land use planning. It should be noted that COSDI made comprehensive recommendations to establish better connections between land-use planning and environmental assessment activities. [*supra* note 9] This Report will not re-examine the issue.

[595] CCME, *Regional Strategic Environmental Assessment in Canada: Principles and Guidance* (2009), online: http://www.ccme.ca/assets/pdf/rsea_in_canada_principles_and_guidance_1428.pdf at 8.

[596] Monique Dubé, "Cumulative Effect Assessment in Canada: A Regional Framework for Aquatic Ecosystems" (2003) 23 Environmental Impact Assessment Review 723 at 724 [Dubé].

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[597] CCME, supra note 595 at 8. While cautioning against an overly prescriptive approach, the CCME identifies nine methodological steps that ought to form part of most RSEA processes [at 73].

[598] Dubé,, *supra* note 596 at 724.

[599] For example, Privy Council Office & Canadian Environmental Assessment Agency, *Cabinet Directive of the Environmental Assessment of Policy, Plan and Program Proposals* (Ottawa: Public Works and Government Services Canada, 2010), online: http://www.ceaa.gc.ca/default.asp?lang=En&n=B3186435-1.

[600] See for example, British Columba, *supra* note 333, s 49; Nova Scotia, *supra* note 359, s 3(az).

[601] CEAA, *supra* note 274, s. 16.2.

[602] See the *Assiniboine Delta Aquifer Management Plan: Planning for the future of the Assiniboine*, 2005, online: https://www.gov.mb.ca/waterstewardship/reports/acquifer/assiniboine_delta_aquifer-mgmt_plan.pdf; *Swan Lake Basin Management Plan*, 2005, http://www.gov.mb.ca/waterstewardship/reports/watershed/swan_lake_wmp_2004-05.pdf.

[603] Bram Noble, "Promise and Dismay: The State of SEA in Canada" (2009) 29:1 *Environmental Impact Assessment Review* 66 at 73.

[604] For example, Manitoba Hydro was required in 2014 to undertake a NFAT analysis of the Corporation's proposed preferred development plan for major new hydroelectric generation and Canada-USA interconnection facilities. Terms of Reference, online: http://www.pub.gov.mb.ca/pdf/nfat/TermsOfReference-Ap25.pdf; Public Utilities Board, *Report on the Needs For and Alternatives To (NFAT) Review of Manitoba Hydro's Preferred Development Plan*, online: http://www.pub.gov.mb.ca/nfat/pdf/finalreport_pdp.pdf]

[605] For example, Licence No. 3107 issued for the Keeyask Generation Project in July 2014 contains the requirement:"Manitoba Hydro shall participate in potential future watershed studies as may be d4etermined by the Director, in cooperation with the Manitoba Government". [Condition 70, online: http://www.gov.mb.ca/conservation/eal/registries/5550keeyask/licence3107.pdf]

[606] In New Brunswick and Nova Scotia, proponents are directed to examine alternative methods of implementing projects. In PEI and NL, however, proponents are explicitly required to examine genuine options – that is alternatives that are functionally different from the project being proposed. For instance, if the proposal involves a highway, the proponent may be directed to examine alternative forms of transportation in terms of their effectiveness in minimizing environmental impacts (eg railway rather than trucking). [Hanna, *supra* note 192, p. 434.]

[607] Hanna, *supra* note 192, at 10.

[608] See recommendation 6.7 of this Report

[609] Sadler, *supra* note 11 at 55.

[610] Manitoba, *supra* note 5, s.11(9)(c), 12 (5)(c).

[611] Manitoba, *supra* note 253.

[612] See Alberta, *EPEA*, supra note 329, s 49(a),(b),(h); Ontario, *supra* note 360, s 6.1(2).

[613] *CEAA*, 2012, *supra* note 6, s.19(1)(g).

[614] Canadian Environmental Assessment Agency, *Review of the Canadian Environmental Assessment Act*, 1999, at 35.

[615] See G Hegmann et al, *Cumulative Effects Practitioner's Guide* (1999) online: Canadian Environmental Assessment Agency, online: http://www.ceaa-acee.gc.ca/default.asp?lang=En&n=43952694-1.

[616] Dubé,, *supra* note 596 at 724.

[617] Peter Duinker & Lorne Greig, "The Impotence of Cumulative Effects Assessment in Canada: Ailments and Ideas for Redeployment" (2006) 37:2 *Environmental Management*, at 153.

[618] The Clean Environment Commission has twice recommended that a regional cumulative effects assessment be undertaken in northern Manitoba. The first time was in the CEC's *Report on Public Hearings: Wuskwatim Generation and Transmission Projects*, p. 119 - "The Government of Manitoba should undertake a regional planning initiative in northern Manitoba and on the east side of Lake Winnipeg, to address existing and future hydroelectric and other developments." [online: http://www.cecmanitoba.ca/resource/reports/Commissioned-Reports-2004-2005-Wuskwatim_Generation_Transmission_Projects_Full_Report.pdf].

The most recent Recommendation was in the 2013 *Report on Public Hearings: Bipole III Transmission Project*, non-licensing recommendation 13.2, p. 126 – "Manitoba Hydro, in cooperation with the Manitoba Government, conduct a Regional Cumulative Effects Assessment for all Manitoba Hydro projects and associated infrastructure in the Nelson River subwatershed; and that this be undertaken prior to the licensing of any additional projects in the Nelson River sub-watershed after the Bipole III Project." [online: http://www.cecmanitoba.ca/resource/reports/FINAL%20WEB%20Bipole%20III%20Transmission%20Project_WEB1.pdf]. In response to this second recommendation by the CEC, the Minister of Conservation and Water Stewardship committed to implementing these recommendations. A Terms of Reference was jointly agreed to between Manitoba and Manitoba Hydro in May 2014 to conduct a RCEA of hydro-electric developments that includes the Nelson, Burntwood, and Churchill River systems [online: https://www.hydro.mb.ca/regulatory_affairs/rcea/rcea_terms_of_reference.pdf]. The Phase 1 Report was released on May 29, 2014 [online: https://www.hydro.mb.ca/regulatory_affairs/rcea/pdf/part123_rcea_phase1.pdf].

[619] For example see: CEAA, *Cumulative Effects Assessment Practitioners Guide*, 1999, online: https://www.ceaa-acee.gc.ca/Content/4/3/9/43952694-0363-4B1E-B2B3-47365FAF1ED7/Cumulative_Effects_Assessment_Practitioners_Guide.pdf ; CEAA, *Technical Guidance for Assessing Cumulative Effects under the Canadian Environmental Assessment Act*, 2012, online: http://www.ceaa.gc.ca/default.asp?lang=en&n=B82352FF-1&offset=&toc=hide; Indian and Northern Affairs Canada, *A Citizen's Guide to Cumulative Effects*, 2007, online: https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-NWT/STAGING/texte-text/ntr_pubs_CEG_1330635861338_eng.pdf; See also: NWT CIMP, *Northwest Territories Cumulative Impact Monitoring Program (CIMP) Strategic Plan to 2015*, 2011, online: http://sdw.enr.gov.nt.ca/nwtdp_upload/CIMP_STRATEGIC_PLAN_2010_15.pdf.

[620] Alberta Environment, Environmental Assessment Branch, *Cumulative Effects Assessment in Environmental Impact Assessment Reports Required under the Alberta Environmental Protection and Enhancement Act*, online: http://environment.alberta.ca/documents/CEA-in-EIA-Reports-Required-under-EPEA.pdf.

[621] CEAA, 2012, *supra* note 6, s 19(1)(a); Alberta, *supra* note 329, s 49(d).

[622] For further discussion of CEA in Manitoba suggested sources include: Jill Gunn and Ayodele Olagunju, Manitoba Hydro's *Needs For and Alternatives To (NFAT) Review of Keeyask and Conawapa Generating Station: Macro Environmental Impact Assessment Guidance*, 2014, online: http://www.pub.gov.mb.ca/nfat/pdf/macro_environmental_gunn.pdf ; Bram Noble and Jill Gunn, *Review of KHLP's Approach to the Keeyask Generation Project Cumulative Effects Assessment*, 2013, online: http://www.cecmanitoba.ca/resource/hearings/39/CAC-010%20Cumulative%20Effects%20Assessment,%20Noble%20&%20Gunn.pdf ; Jill Gunn and Bram Noble, *Critical Review of the Cumulative Effects Assessment Undertaken by Manitoba Hydro for the Biople III Project*, 2012, online: http://a100.gov.bc.ca/appsdata/epic/documents/p371/1390852181964_0ff1ea60123674ce5002c0a54f5921f186bd1e29daebae83a581aabb2013ecac.pdf; Public Utilities Board, *supra* note 604; Clean Environment Commission, *supra* note 618.

[623] See Office of the Auditor General of Canada, *2011 October Report of the Commissioner of the Environment and Sustainable Development* (October 4, 2011) at Chapter 2, online: Office of the Auditor General of Canada http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201110_e_35765.html.

[624] International Finance Corporation, World Bank Group, *Good Practice Handbook- Cumulative Impact Assessment and Management: Guidance for Private Sector in Emerging Markets* (August 2013) at 54 online: http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_handbook_cumulativeimpactassessment.

[625] For example, see s. 1(1)(b); s. 1(2) – "alter", "development"; s. 13(2); s. 14(2); s. 16.

[626] Nova Scotia, *supra* note 359, s. 3.

[627] CEAA, *Reference Guide: Determining Whether a Project is Likely to Cause Significant Adverse Environmental Effects*, 1994, online: https://www.ceaa-acee.gc.ca/Content/D/2/1/D213D286-2512-47F4-B9C3-08B5C01E5005/Determining_Whether_a_Project_is_Likely_to_Cause_Significant_Adverse_Environmental_Effects.pdf ; See also: CEAA, *Operational Policy Statement: Assessing Cumulative Environmental Effects under the Canadian Environmental Assessment Act, 2012*, 2015, online: https://www.ceaa-

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acee.gc.ca/Content/1/D/A/1DA9E048-4B72-49FA-B585-B340E81DD6AE/Cumulative%20Effects%20OPS%20-%20EN%20-%20March%202015.pdf .

[628] For example, in the Terms of Reference for the Lake Winnipeg Regulation CEC hearing that took place in 2015 it is stated that: "*The Environment Act* does not apply to the Lake Winnipeg Regulation project as it was completed before this legislation came into force." [Clean Environment Commission, *Terms of Reference: Lake Winnipeg Regulation*, page 2].

[629] For example, Grand Rapids Generating Station, Kelsey Generating Station, Laurie River Generating Station, and Long Spruce Generating Station.

[630] For example, NWT, *supra* note 351, s. 157.1; *CEAA, 2012*, *supra* note 6, s. 128.

[631] Manitoba, *supra* note 5, s.10(2), 11(6), 12(2).

[632] For example, see the Pointe Du Bois Spillway Replacement Project and the Grand Rapids Walleye Spawning Enhancement Project. In both cases, the scope of the environmental assessment and licence issued for the expansion/improvement of the existing hydroelectric generation facilities was limited to the new additions or alterations proposed for the existing development.

[633] Manitoba, *supra* note 5, s. 13(1).

[634] COSDI, *supra* note 8, Recommendation 41.

[635] New Brunswick, *Environmental Impact Assessment Regulation*, NB Reg 87-83, s. 6(4). This section allows the minister to view an undertaking in isolation or together with any enterprise, activity, project, structure, work or program that is likely to be carried on with the undertaking.

[636] The exception to this rule is Class 2 licences issued for Forest Management Plans (FMP) for Forest Management Licence Agreement areas. Such licence holders are required to develop and licence FMPs every 20 years.

[637] Manitoba Conservation, *supra* note 9.

[638] Manitoba Conservation, *Ibid*, p. 11.

Appendix A

Glossary of Environmental Assessment Terminology

Term	Meaning
Aboriginal Traditional Knowledge (federal)	Knowledge that is held by, and unique to Aboriginal peoples.[1]
Adaptive management	Consists of a planned and systematic process for continuously improving environmental management practices by learning about their outcomes. It involves, among other things, the implementation of new or modified mitigation measures over the life of a project to address unanticipated environmental effects.[2]
Adverse environmental effect	Impairment of or damage to the environment, including a negative effect on human health or safety.[3]
Alter	To change a development or a proposal or to close, shut down or terminate a development where the alteration causes or is likely to cause a significant change in the effects of the development on the environment.[4]
Alternative means (federal)	The various technically and economically feasible ways, other than the proposed way, for a designated project to be implemented or carried out. Examples include consideration of other project locations, different routes, alternative mitigation measures, and other methods of project development and implementation.[5]
Alternatives to (federal)	The functionally different ways to meet the project need and achieve the project purpose. Analysis of alternatives to the project should describe the process the proponent used to determine that the project is viable (technically, economically and environmentally).[6]
Assessment area (project)	The area includes all lands subject to direct disturbance from the project and associated infrastructure. Also called the project footprint.[7]
Assessment area (local)	The area existing outside the boundaries of the Project Area, where there is a reasonable potential for immediate environmental effects due to ongoing project activities. Defines the spatial extent directly or indirectly affected by the project.[8]
Assessment area (regional)	The area within which there is the potential for cumulative and socio-economic effects, and that may be relevant to the assessment of any wider-spread effects of the project.[9]
Baseline	Conditions that exist or would exist prior to development of the project or the conditions that would exist if the project were not developed.[10]
Baseline studies	Initial scientific investigations that determine the present ecological state of an area and establish a basic reference necessary for further studies. Also called existing environment or pre-project conditions.[11]
Class 1 development (Manitoba)	Any development that is consistent with the examples or the criteria or both set out in the regulations for class 1 developments, and the effects of which are primarily the release of pollutants.[12]
Class 2 development	Any development that is consistent with the examples or the criteria or both set out in the regulations for class 2 developments and the effects of which are

Term	Meaning
(Manitoba)	primarily unrelated to pollution or are in addition to pollution.[13]
Class 3 development (Manitoba)	Any development that is consistent with the examples or the criteria or both set out in the regulations for class 3 developments and the effects of which are of such a magnitude or which generate such a number of environment issues that it is as an exceptional project.[14]
Community knowledge (federal)	Information held by community members, such as farmers, hunters, fishers and naturalists, who are familiar with the environment in a specific geographic area.[15]
Compliance	Conforming with or fulfilling the requirements of CEAA, 2012, including conditions in relation to the environmental effects of a designated project that are specified in the environmental assessment decision statement.[16]
Cumulative environmental effects (federal)	The environmental effects that are likely to result from a project in combination with the environmental effects of other past, existing and future actions for the reasonably foreseeable future in a predefined regional assessment area.[17]
Cumulative environmental effects	A change in the environment caused by multiple interactions among human activities and natural processes that accumulate across space and time.[18]
Cumulative effects assessment	A systematic process of identifying, analyzing, and evaluating cumulative effects.[19]
Development (Manitoba)	A project, industry, operation or activity, or any alteration or expansion of any project, industry, operation or activity which causes or is likely to cause: a) the release of any pollutant into the environment, or b) an effect on any unique, rare, or endangered feature of the environment, or c) the creation of by-products, residual or waste products not regulated by The Dangerous Goods Handling and Transportation Act, or d) a substantial utilization or alteration of any natural resource in such a way as to pre-empt or interfere with the use or potential use of that resource for any other purpose, or e) a substantial utilization or alteration of any natural resource in such a way as to have an adverse impact on another resource, or f) the utilization of a technology that is concerned with resource utilization and that may induce environmental damage, or g) a significant effect on the environment or will likely lead to a further development which is likely to have a significant effect on the environment, or h) a significant effect on the social, economic, environmental health and cultural conditions that influence the lives of people or a community in so far as they are caused by environmental effects.[20]
Development description	A description of a proposed development that describes the main components and activities, and its potential interactions with the environment, and provides other information for scoping purposes.[21]
Director (Manitoba)	Except where the context otherwise requires, an employee of the department appointed as such by the Minister.[22]
Engagement (public)	Involvement of the public during the conduct of an environmental assessment

Term	**Meaning**
	where there is an opportunity form meaningful two-way dialogue.[23]
Enforcement	Actions or activities to verify that a proponent is in compliance with the requirements of CEAA, 2012, compel compliance, or respond to violations.[24]
Environment (Manitoba)	Air, land, and water, or plant and animal life, including humans.[25]
Environment (federal)	The components of the Earth, and includes: (a) land, water and air, including all layers of the atmosphere, (b) all organic and inorganic matter and living organisms, and (c) the interacting natural systems that include components referred to in paragraphs (a) and (b).[26]
Environment (Ontario)	• air, land or water, • plant and animal life, including human life, • the social, economic and cultural conditions that influence the life of humans or a community, • any building, structure, machine or other device or thing made by humans, • any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities, or • any part or combination of the foregoing and the interrelationships between any two or more of them, in or of Ontario. [27]
Environment officer (Manitoba)	A person or a member of a class of persons appointed under subsection 3(2) of *The Environment Act*.[28]
Environmental assessment	An environmental assessment predicts the environmental effects of a designated project, identifies mitigation measures, assesses whether the designated project is likely to cause significant adverse environmental effects taking into account identified mitigation measures, and ensures a follow-up program is designated to verify the accuracy of the environmental assessment of the designated project and effectiveness of any mitigation measures.[29]
Environmental assessment report (federal)	Document summarizing the environmental assessment process that takes into consideration the analysis by the proponent and associated perspectives of expert federal authorities, the public, Aboriginal groups, the province (as appropriate) and the responsible authority.[30]
Environmental component	Fundamental element of the physical, biological or socio-economic environment, including the air, water, soil, terrain, vegetation, wildlife, fish, birds and land use that may be affected by a designated project, and may be assessed in an environmental assessment.[31]
Environmental effect (federal)	The environmental effects that must be taken into account under CEAA, 2012, as described in section 5 of CEAA, 2012.[32]
Environmental effect (Nova Scotia)	In respect of an undertaking, any change, whether negative or positive, that the undertaking may cause in the environment, including any effect on socio-economic conditions, on environmental health, physical and cultural heritage or on any structure, o site or thing including those of historical, archaeological, paleontological or architectural significance, and any change to the undertaking that may be caused by the environment, whether the change occurs inside or outside the Province.[33]
Environmental effect(s)	The physical and natural changes to the environment resulting, directly or indirectly, from development.[34]

Term	**Meaning**
Environmental impact statement (federal)	A detailed technical document prepared by the proponent that identifies the potential adverse environmental effects of a designated project including cumulative effects, measures to mitigate those effects, and an evaluation of whether the designated project is likely to cause any significant adverse environmental effects.[35]
Environmental impact statement	A documentation of the information and estimates of effects derived from the various steps in the environmental assessment process[36]
Environmental management plan (Manitoba)	A plan prepared by the proponent as a licence condition to implement licence terms and conditions, and mitigation measures, follow-up actions and other commitments identified in the environmental assessment report for the development project.[37]
Environmental protection plan	A practical tool that describes certain actions to minimize environmental effects before, during and after implementation of a designated project. The plan may include details about the nature and implementation of certain mitigation measures identified in an environmental assessment.[38]
Equivalency (federal)	On the recommendation of the Minister of the Environment and by order, the exemption of a designated project from the application of CEAA, 2012 by the Governor-in-Council under conditions specified in CEAA, 2012, if an equivalent environmental assessment is conducted by a province.[39]
Follow-up program	A program for verifying the accuracy of the environmental assessment of a designated project, and determining the effectiveness of any mitigation measures.[40]
Local knowledge	Information held by local people who are familiar with the environment in a specific geographic area.[41]
Minister (Manitoba)	The member of the Executive Council charged by the Lieutenant Governor-in-Council with the administration of *The Environment Act*.[42]
Mitigation measures	Measures for the elimination, reduction or control of the adverse environmental effects of a designated project, and includes restitution for any damage to the environment caused by those effects through replacement, restoration, compensation or any other means.[43]
Monitoring (compliance)	A broad term for a type of monitoring conducted to verify whether a practice or procedure meets the applicable requirements prescribed by legislation, internal policies, accepted industry standards or specified terms and conditions (e.g., in an agreement, lease, permit, license or authorization).[44]
Monitoring (environmental)	Periodic or continuous surveillance or testing of one or more environmental components according to a pre-determined schedule. Monitoring is usually conducted to determine the level of compliance with stated requirements, or to observe the status and trends of a particular environmental component over time.[45]
Practitioner (environmental assessment)	A person directly involved in some aspect of the conduct or direction of an environmental assessment. A practitioner could be a proponent, a consultant, a representative of the government or have some other affiliation.[46]
Project (federal)	A physical activity that is carried out on federal lands or outside Canada in

Term	Meaning
	relation to a physical work and is not a designated project. This definition relates to the responsibilities of certain authorities for projects on federal lands and outside Canada, as opposed to responsibilities in relation to "designated projects".[47]
Project (British Columbia)	Any, activity that has or may have adverse effects, or construction, operation, modification, dismantling or abandonment of a physical work.[48]
Project (international)	The execution of construction works or of other installations or schemes; or other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.[49]
Project activities	The different physical actions that are carried out during construction, operation and maintenance of a project component. Project activities are action words that typically end in "ing".[50]
Project components	The different physical entities that together make up the project.[51]
Project description (federal)	A document prepared by a proponent that introduces a proposed designated project and its potential interactions with the environment.[52]
Proponent (Manitoba)	A person who is undertaking, or proposes to undertake a development, or who has been designated by a person or group of persons to undertake a development in Manitoba on behalf of that person or group of persons.[53]
Proponent (federal)	The person, body, federal authority or government that proposes the carrying out of a designated project.[54]
Proprietary information	Information or data provided to the department on a confidential basis, the criteria for which is outlined in the regulations or any Act of the Legislature, or is negotiated between the department and the provider of the information.[55]
Public participation (federal)	Can involve activities such as submitting written comments on an environmental assessment document or attending information sessions related to a designated project, among other opportunities for involvement.[56]
Public registry (Manitoba)	The registry established under section 17 of *The Environment Act*.[57]
Public registry (federal)	An information system that facilitates public access to records related to environmental assessments of designated projects conducted under CEAA, 2012 and provides notice in a timely manner of those assessments.[58]
Regional strategic environmental assessment	A process designed to systematically assess the potential environmental effects, including cumulative effects, of alternative strategic initiatives, policies, plans, or programs for a particular region.[59]
Regional study (federal)	Under CEAA, 2012, a committee may be established by the Minister of the Environment to conduct a study of the effects of existing or future physical activities carried out in a region that is entirely on federal lands. The results of a regional study must be considered in all relevant screenings and environmental assessments conducted by the Agency.
Residual environmental effect	An environmental effect of a designated project that remains, or is predicted to remain, after mitigation measures have been implemented.[60]
Scoping	An activity that focuses the assessment on relevant issues and concerns and establishes the boundaries of the environmental assessment. A consultative process for identifying and possibly reducing the number of items (e.g., issues,

Term	**Meaning**
	valued components) to be examined until only the most important items remain for detailed assessment. Scoping ensures that assessment effort will not be expended in the examination of trivial effects.[61]
Screening (federal)	The process that the Agency follows to determine if an environmental assessment of a designated project is required. The screening is completed within 45 days after the posting by the Agency of a summary of the project description and of a notice on the Internet site: • indicating that the designated project is the subject of a screening; • inviting the public to provide comments respecting the designated project within 20 days; • after the posting of the notice; and • indicating the address for filling those comments.[62]
Significance determination (federal)	A conclusion as to whether the designated project is likely to cause significant adverse environmental effects taking into account the implementation of appropriate mitigation measures.[63]
Significant (Nova Scotia)	With respect to an environmental effect, an adverse effect that occurs or could occur as a result of any of the following: o the magnitude of the effect, • the geographic extent of the effect, • the duration of the effect, • the frequency of the effect, • the degree of reversibility of the effect, • the possibility of occurrence of the effect.[64]
Strategic environmental assessment	The systematic and comprehensive process of evaluating the environmental effects of a policy, plan or program and its alternatives.[65]
Substitution	A provision under CEAA, 2012 that provides, under certain conditions, for the environmental assessment process of a province or an environmental assessment body established under a land claim or a self-government agreement to be substituted by the Minister for the conduct of an environmental assessment of a designated project by the Agency.[66]
Sustainable development (Manitoba)	Meeting the needs of the present without compromising the ability of future generations to meet their own needs.[67]
Sustainable development (federal)	Development that meets the needs of the present, without compromising the ability of future generations to meet their own needs.[68]
Sustainability assessment	Any process that directs decision-making towards sustainability.[69]
Sustainability assessment	An assessment of the sustainability of a proposed project against sustainable development factors and criteria, standards or indicators.[70]
Threshold	A limit of tolerance of an environmental component to a change, that if exceeded, results in an adverse response by that component.[71]
Traditional ecological knowledge	A body of knowledge primarily concerned with the environment that is built up by a group of people through generations of living in close contact with nature.[72]
Valued component	Valued components refer to environmental features that may be affected by a project and that have been identified to be of concern by the proponent,

Term	**Meaning**
	government agencies, Aboriginal peoples or the public. The value of a component not only relates to its role in the ecosystem, but also to the value people place on it. For example, it may have been identified as having scientific, social, cultural, economic, historical, archaeological or aesthetic importance.[73]

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[1] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.* Section 19 of CEAA, 2012 includes community knowledge and Aboriginal Traditional Knowledge as factors that may be considered in the environmental assessment of a designated project

[2] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012*

[3] *The Environment Act* (Manitoba).

[4] *The Environment Act* (Manitoba).

[5] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.*

[6] Addressing "Need for", "Purpose of", "Alternatives to" and "Alternative Means" under the *Canadian Environmental Assessment Act* (2007).

[7] Glossary of Environmental Assessment Terms and Acronyms Used in Alberta (Government of Alberta 2010).

[8] Glossary of Environmental Assessment Terms and Acronyms Used in Alberta (Government of Alberta 2010).

[9] Glossary of Environmental Assessment Terms and Acronyms Used in Alberta (Government of Alberta 2010).

[10] Glossary of Environmental Assessment Terms and Acronyms Used in Alberta (Government of Alberta 2010).

[11] Glossary of Environmental Assessment Terms and Acronyms Used in Alberta (Government of Alberta 2010).

[12] *The Environment Act* (Manitoba).

[13] *The Environment Act* (Manitoba).

[14] *The Environment Act* (Manitoba).

[15] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.* Section 19 of CEAA, 2012 includes community knowledge and Aboriginal Traditional Knowledge as factors that may be considered in the environmental assessment of a designated project.

[16] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.*

[17] Adapted from Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act.*

[18] CCME Website. http://www.ccme.ca/en/current_priorities/cumulative_effects/index.html

[19] CCME Website. http://www.ccme.ca/en/current_priorities/cumulative_effects/index.html

[20] *The Environment Act* (Manitoba).

[21] *Ad hoc* Made up from common usage in environmental assessment.

[22] *The Environment Act* (Manitoba).

[23] *Ad hoc* Made up from common usage in environmental assessment.

[24] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.* . Specific provisions within CEAA, 2012 provide the authority for these actions

[25] *The Environment Act* (Manitoba).

[26] *Canadian Environmental Assessment Act, 2012.*

[27] *Environmental Assessment Act* (Ontario)

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[28] *The Environment Act* (Manitoba).

[29] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.*

[30] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.* The environmental assessment report must provide sufficient information to the decision maker (the responsible authority, or when the Agency is the responsible authority, the Minister of the Environment) to enable a determination of whether the designated project is likely to cause significant adverse environmental effects, taking into account the implementation of mitigation measures that are also considered appropriate by the decision maker. The environmental assessment report also documents the planning process and how the conclusions and recommendations were made. In the case of a review panel, the environmental assessment report is the review panel report.

[31] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.*

[32] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.*

[33] Nova Scotia, *Environment Act,* S.N.S. 1994-95, c. 1

[34] Adapted from IAIA International Glossary.

[35] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.*

[36] IAIA International Glossary.

[37] *Ad hoc*

[38] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.*

[39] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.*

[40] *Canadian Environmental Assessment Act, 2012.*

[41] *Ad hoc* Made up from common usage in environmental assessment.

[42] *The Environment Act* (Manitoba).

[43] *Canadian Environmental Assessment Act, 2012.*

[44] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act.*

[45] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.*

[46] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.*

[47] *Canadian Environmental Assessment Act, 2012.*

[48] *Environmental Assessment Act* (British Columbia)

[49] IAIA International Glossary.

[50] *Ad hoc* Made up from common usage in environmental assessment.

[51] Glossary of Environmental Assessment Terms and Acronyms Used in Alberta (Government of Alberta 2010).

[52] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.* The project description must be submitted to the Agency. Information requirements for a project description are set out in the Prescribed Information for the Description of a Designated Project Regulations.

[53] *The Environment Act* (Manitoba).

[54] *Canadian Environmental Assessment Act, 2012.*

[55] *The Environment Act* (Manitoba).

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[56] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.*

[57] *The Environment Act* (Manitoba).

[58] *Canadian Environmental Assessment Act, 2012.*

[59] Regional Strategic Environmental Assessment in Canada: Principles and Guidance (CCME 2009).

[60] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.* CEAA, 2012 provides the authority to the Minister of the Environment to enter into an agreement with another jurisdiction to establish a joint committee to conduct a regional study in a region composed in part of federal lands or completely outside federal lands.[60]

[61] Glossary of Environmental Assessment Terms and Acronyms Used in Alberta (Government of Alberta 2010).

[62] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.*

[63] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.*

[64] Nova Scotia, *Environmental Assessment Regulations*

[65] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act.*

[66] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.* The Minister of the Environment must approve substitution at the request of a province or may approve substitution for an environmental assessment body established under a land claim or a self-government agreement, if the Minister is of the opinion that the environmental assessment process would be an appropriate substitute and all the conditions as specified in CEAA, 2012 or any additional conditions set by the Minister will be met. The Minister retains the environmental assessment decision-making authority.

[67] *The Sustainable Development Act.*

[68] *Canadian Environmental Assessment Act, 2012.*

[69] Bond, A., A. Morrison-Saunders and J. Pope, 2012, Sustainability Assessment: The State of the Art. Impact Assessment and Project Appraisal 30(1): 53-62.

[70] *Ad hoc* Made up from common usage in environmental assessment.

[71] Glossary of Environmental Assessment Terms and Acronyms Used in Alberta (Government of Alberta 2010).

[72] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.*

[73] Practitioners Glossary for the Environmental Assessment of Designated Projects Under the *Canadian Environmental Assessment Act, 2012.* For the purposes of CEAA, 2012, valued components are selected in relation to section 5 of CEAA, 2012 and taking into account direction provided by the responsible authority, or in the case of an environmental assessment by review panel, by the Agency or the Minister